Dec 21 1877

~~Submitted~~ 7-300.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 599.

THE CITY OF MEMPHIS, APPELLANT AND PLAINTIFF IN ERROR,

VS.

T. E. BROWN.

IN ERROR TO AND APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Affd

FILED MARCH 14, 1877.

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Dec affd

$115 Strong

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UNITED STATES CIRCUIT COURT

(WESTERN DISTRICT OF TENNESSEE.)

Proceedings had in the Circuit Court of the United States for the Sixth Judicial Circuit thereof, Western District of Tennessee, at a Regular Term of said Court, begun and held for its November Term, A. D. 1875, at the Federal Court-rooms in the City of Memphis, on to-wit: the 2nd day of March, 1876, and days previous thereto, in the following Cause:

UNITED STATES ON THE RELATION OF
TALMADGE E. BROWN
vs.
THE CITY OF MEMPHIS AND OTHERS.

No. 1874½
Law Docket.

Writ of Error to Judgment of 2d of March, 1876.

◆

2 United States Circuit Court,

(WESTERN DISTRICT OF TENNESSEE.)

Proceedings had in the Circuit Court of the United States for the Sixth Judicial Circuit thereof, Western District of Tennessee, at a Regular Term of said Court, begun and held for its November Term, A.D. 1874, at the Federal Court Rooms in the City of Memphis, on to-wit: the 12th day of March, 1875, and days subsequent thereto, in the following Cause:

TALMADGE E. BROWN
vs.
CITY OF MEMPHIS.

THE CITY OF MEMPHIS
vs.
TALMADGE E. BROWN.

147 Eq. Docket.

AND

TALMADGE E. BROWN
vs.
THE CITY OF MEMPHIS.

Cross Bill.

Now comes the said Talmadge E. Brown, plaintiff in the cross bill in
this case, in person, and on the 12th day of March, A.D., 1875, files in
3 open Court the mandate of the Supreme Court of the United States
in this cause, and the same is ordered by the Court to be spread upon
the Record of this Court in the words and figures following, to-wit:

"MANDATE SUPREME COURT UNITED STATES," UNITED STATES OF AMERICA,

The President of the United States of America.

To the Honorable the Judges of the Circuit Court of the United States for the Western District of Tennessee—Greeting:

Whereas, lately in the Circuit Court of the United States, for the Western District of Tennessee, before you or some of you, in a cause between the City of Memphis, complainant, and Talmadge E. Brown, surviving partner of the late firm of T. E. Brown & Co., defendant in bill, and Talmadge E. Brown, surviving partner of the late firm of T. E. Brown & Co.,
complainant, and the City of Memphis (defendant) in the cross bill,
4 wherein the decree of the said Circuit Court entered in said cause is
in the following words, viz:

In this cause, at a prior day of this term, the Court having delivered an opinion upon the matters involved herein, after the argument thereof by counsel and the submission thereof to the Court at a prior term of this Court, the cause came on to be further heard at this term upon exceptions to the Master's report, and upon the proof on file, and it appears to the Court that the exceptions to the report are not well taken, the same are hereby severally overruled, and the report of the Master is confirmed except as to the item of one hundred and fifteen thousand, two hundred and sixteen dollars ($115,216) damages, suffered by failure to provide a sinking fund; and as to the said item the Court, on application of the City of Memphis,
allowed further proof to be taken, and under such permission the
5 depositions of I. B. Kirtland, William M. Farrington, H. E. Garth,
J. J. Freeman, L. Levy, J. J. Murphy and F. H. Cossitt, on the part of the City of Memphis, and of F. S. Davis, W. W. Thatcher, E. D. Cobb, T. R. Farnsworth, B. Richards, W. C. McClure, N. B. Forrest, J. W. Page, jr., John Ainslie and E. M. Apperson, on the part of Talmadge E. Brown, now taken and filed and the cause coming on for further consideration on such testimony, and the further consideration of the other testimony in the case, and the said report, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered adjudged and decreed as follows, viz: That the said sum of one hundred and fifteen thousand two hundred and sixteen dollars in said report be not allowed, but that instead thereof there be allowed the sum of eighty-nine thousand eight hundred and eight dollars, and as so modified, said report stands confirmed.

6 And further that the relief prayed in the bill of complaint of the
City of Memphis as to all matters not embraced in the accounting before the Master and determined in the confirmation thereof; and that Talmadge E. Brown ought to have and receive of and from the City of Memphis, under the cross bill herein, the sum of four hundred and seventy-one thousand and sixteen dollars and sixty-four cents, being the balance found due by the Master's report, as hereby modified, together with interest thereon from the first day of August, 1871, the date of the Master's report, to-wit: the sum of seventeen thousand and nine hundred and seventy-seven dollars and eight cents, making a total principal and interest of four hundred and eighty thousand nine hundred and ninety-three dollars, which sum of money the City of Memphis ought forthwith to pay to said Talmadge E. Brown; and further, that said Talmadge E. Brown have and recover of and from the City of Memphis the said sum of four hundred and eighty-eight
thousand nine hundred and ninety-three dollars, ($488,993), with
7 his costs to be taxed by the clerk, and this judgment and decree shall
bear interest at six per cent. per annum; and further, that there

shall be taxed in the costs against the City of Memphis for A. S. Mitchell, Esq., the Master herein, the sum of fourteen hundred and twenty dollars; and further, that execution shall issue for the enforcement of this decree and judgment, as upon judgments at law, as by inspection of the transcript of the record of the said Circuit Court which was brought into the Supreme Court of the United States by virtue of an appeal taken by the City of Memphis agreeably to the act of Congress in such case made and provided fully and at large appears.

8 And whereas, at the present term of October, in the year of our Lord one thousand eight hundred and seventy-three, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be and the same is hereby reversed with costs, and that the said City of Memphis recover against the said Talmadge E. Brown five hundred and sixty-eight dollars and eighty-seven cents for its costs herein expended, and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the said Circuit Court with directions to enter a decree in conformity with the opinion of this Court, 6th April, 1874. You therefore are
hereby commanded that such execution and further proceedings be
9 had in said cause in conformity to the opinion and decree of this
Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding. Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the eighth day of March, in the year of our Lord one thousand and eight hundred and seventy-five.

COSTS OF THE CITY OF MEMPHIS.

Clerk, ...	$548.87
Attorney, ...	20.00
	$568.87

Taxed by D. W. Middleton, Clerk Supreme Court United States.

Endorsed—No. 226, October Term, 1873.

Mandate Supreme Court United States—Memphis vs. Brown—Filed March 12, 1875. H. E. ANDREWS, *Clerk.*

10 United States Circuit Court,

(WESTERN DISTRICT OF TENNESSEE.)

Proceedings had in the Circuit Court of the United States for the Sixth Judicial Circuit thereof, Western District of Tennessee, at a Regular Term of said Court, begun and held for its November Term, A. D. 1874, at the Federal Court Rooms in the City of Memphis, on to-wit: the 16th day of March, 1875, and days subsequent thereto, in the following Cause:

TALMADGE E. BROWN
vs. } Bill and Cross Bill.
CITY OF MEMPHIS.

In this cause the city of Memphis appears by its acting attorney, G. A.

Hanson, Esq., and Talmadge E. Brown by his attorney, S. Sibley, Esq.; and the cause is brought on for final decree in accordance with the mandate, judgment and opinion of the Supreme Court of the United States in this cause rendered at the October term thereof A. D. 1873, whereby the decree of this Court hereinbefore rendered on the 13th day of March,
A. D. 1872, was declared in all things correct except as to the three
11 items, part of the amount of such decree and aggregating the sum
of one hundred and twenty-four thousand eight hundred and eight
dollars ($124,808), which items were disallowed by said Supreme Court and to discharge the decree of this Court thereof. The same was reversed and remanded to this Court for these further proceedings; and it now further appearing that the city of Memphis has, since the rendition of the decree, paid to said Brown thereon the sum of one hundred and thirty thousand two hundred and ninety-two dollars and sixty-nine cents ($130,292.69) in divers partial payments, and that there yet remains due from the city of Memphis to Talmadge E. Brown, after deducting said payments, amounting to one hundred and thirty thousand two hundred and ninety-two dollars and sixty-nine cents ($130,292.69), and after striking out the sum of one hundred and twenty-four thousand eight hundred and eight dollars ($124,808) as decreed by the said Supreme Court and all interest thereon
allowed in the former decree of this Court, the sum of two hun-
12 . dred and ninety-two thousand one hundred and thirty three dollars
and forty-seven cents ($292,133.47.)

It is therefore ordered and decreed that the city of Memphis do forthwith pay to said Talmadge E. Brown directly or to the Registry of this Court for him the said sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents ($292,133.47), together with interest thereon till paid at the rate of six per cent. per annum, and it is ordered and decreed that said Talmadge E. Brown have and recover from the city of Memphis the aforesaid sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents ($292,133.47), together with the costs of this suit to be taxed, and that this judgment and decree bear interest at the rate of six per cent. per annum till paid as aforesaid, and that execution therefore forthwith issue.

13. Petition for Mandamus.

Filed March 22, 1875.

H. E. ANDREWS, CLERK.

THE UNITED STATES ON THE RELATION OF T. E. BROWN
vs.
THE CITY OF MEMPHIS.
} U. S. Circuit Court District West Tennessee.

To the Honorable Judge of Said Court:

Your petitioner represents and shows to the Court that in the year A. D. 1867 the city of Memphis under the provisions of an act of the Legislature of the State of Tennessee contracted with the firm of Taylor, McBean & Co., made up of Abner Taylor, A. G. McBean and Alexander McBean; also contracted with the firm of Forrest, Mitchell & Co. for paving certain
of its streets with what is known as the Nicholson pavement, and
14 undertook to charge the cost thereof to the owners of the abutting
property, proportioning the same according to the frontage of each
lot, and to require that the owners of the same should pay such costs as debts contracted by themselves.

Petitioner further alleges that said parties entered upon this said work under said contracts and completed portions of same; and that subsequently, in the year 1868, the firm of T. E. Brown & Co. (composed of T. E. Brown and J. Langdon) succeeded to all the rights of all of said contracting parties with the city of Memphis, and completed the same fully and to the entire satisfaction of said city, and the same was thereupon accepted by the city.

Petitioner further alleges that the property owners paid a part of the cost of said work, but a great many of them refused to pay, and a large amount
being due and unpaid bills were filed for the recovery of the same
15 in the Court of Chancery as contemplated by the said act of the
Legislature, and decrees were therein rendered and the cases were taken by appeal to the Supreme Court of Tennessee. Wherein upon final hearing it was decided that the city had no power to make the abutting property owners pay the costs of said work and discharged the said owners from the payment of said liabilities.

And petitioner alleges that he as surviving partner brought suit on said contracts against said city in this Court for the unpaid portions of said work, and that such proceedings were had that a decree was rendered by this Court in his favor against said city on the —— day of March, 1872, for a balance of $488,993 besides costs.

The cause was taken by appeal to the United States Supreme Court, and where the decree of this Court was pronounced correct, except in certain
particulars, and the cause was remanded to this Court with instruc-
16 tions to render a decree in favor of petitioner in accordance with the
opinion of that Court.

And on the 15th day of March, 1875, in pursuance of the said mandate, a decree was rendered in this Court in favor of said Talmadge E. Brown and against the city of Memphis in the sum of $292,133.47 and the costs of the suit, and that execution issue therefor instanter.

Petitioner alleges an execution has issued on the said decree and has been returned no property found out of which to make said judgments, and the city has no money with which to pay the same and no property out of which it can be made, all of its property being exempt from execution and sale thereunder; and the city has no means with which to pay the said
judgment save and except by levying a tax upon all of the taxable
17 persons and property within its limits for this purpose.

Plaintiff alleges that in addition to the city's other powers of taxation the Legislature of the State of Tennessee on the 18th day of March, 1873, by an act then passed enacted, among other things, as follows, to-wit: An act "to amend the charter of all the incorporated towns and cities in the State."

Section 1st. Be it enacted by the General Assembly of the State of Tennessee, That where any incorporated town or city has by virtue of presumed authority to lay special assessments for specific purposes, levied and collected taxes or special assessments, the right to make which levy and assessments was afterwards declared void by the Supreme Court of the State, said town or city shall have the power to levy a tax in addition to all other taxes allowed by law to be levied sufficient to cover the entire costs of the improvements with interest thereon for which said special assessments were illegally made, etc., etc.

And petitioner avers that the debt so due him as appears by the said decree accrued in the manner contemplated by the said act—that is

18 to say, the same was incurred by the city of Memphis as a part of this entire cost of paving portions of the public streets of the city, which paving was done under contracts made in pursuance of ordinances of the city and acts of the Legislature of the State whereby the city undertook and assumed to levy and collect from the property abutting the streets on which the paving was done the costs thereof, and after the said paving was done and accepted as hereinbefore stated and before the said 18th day of March, 1873, the Supreme Court of the State of Tennessee decided that no right or power to make the said levy or assessment existed, and that the attempt to make the same was void. For particularity as to all the matters herein stated the petitioner refers to the records and proceedings in the said cause in which he recovered the said decree, now on file in this Court, and prays the same may be considered as a part of this his petition.

19 Petitioner alleges that he is a citizen of the State of Iowa, and that the respondent is a citizen of the State of Tennessee.

Plaintiff says that notwithstanding said act of the Legislature and the respondent's general power of taxation and the fact that plaintiff has frequently demanded the payment of his said debt and a levy of a tax sufficient in amount to pay his said decree, the city has failed either to pay the same or to levy a tax sufficient for this purpose, and neglects and refuses to do so. Plaintiff alleges that the Hon. John Loague is the Mayor of Memphis, and the following named persons constitute the General Council of the city of Memphis, to-wit:

BOARD OF COUNCILMEN.

P. J. Kelly,
Herman Caro,
Wm. Hewitt,
20 S. J. Camp,
Alf G. Tuther,
S. W. Green,
H. Luhrman,
Joseph Clouston, Jr.,
Richard Doherty,
Wm. Gay,
Charles G. Fisher,
J. S. Carpenter,
L. Solari,
J. W. Moores,
J. W. Cochran,
J. D. Danbury,
L. D. Grant,
Jacob Moon,
T. A. Ryan,
John Zent.

BOARD OF ALDERMEN.

Owen Dwyer,
C. W. Metcalf,
Nick Malatesta,
H. G. Dent,
I. Happek,
J. T. Hillsman,
A. J. White,
M. J. Doyle,
G. A. Morti,
S. B. Robbins.

In consideration of the premises the petitioner prays that an alternative writ of mandamus issue, returnable on the 26th day of March, 1875, requiring the City of Memphis and its said Mayor and General Council to pay immediately to petitioner the amount due on said decree, including interests and costs, or in default thereof to levy each year for the ensuing years, to-wit: 1875, 1876 and 1877, a tax in addition to all other taxes sufficient in amount, after making due allowance for all delinquencies, insolven-
21 cies and defaults, to realize $125,000 each year, and to pay over the same to said Talmadge E. Brown as fast as collected, or so much thereof as may be necessary for the purpose of satisfying this decree, or show cause to the contrary; and for such further, other and different order in the premises as to this Honorable Court may seem fit and proper, and your petitioner will ever pray, &c.

T. E. BROWN, *in person.*

SHELBY COUNTY, }
STATE OF TENNESSEE, } SS.

T. E. Brown, the relator in the foregoing entitled action, being duly sworn before me the undersigned, deposes and says that the allegations in this petiton are true as he verily believes. T. E BROWN.

Subscribed and sworn to before me this 22d day of March, 1875.

LEONARD H. PILLSBURY, *U. S. Com. D. W. T.*

22

ORDER FOR ALTERNATIVE WRIT.

In consideration of the petition which is now filed the clerk will issue the Alternative Writ of Mandamus as prayed for in the foregoing petition, returnable on the 26th day of March, 1875, at 10 o'clock, A. M.

March 22d, 1875.

No. 1874½—Talmadge E. Brown vs. City of Memphis, et. als.

Writ of Mandamus issued March 22, 1875. Returned and filed June 1st, 1875.

UNITED STATES OF AMERICA, }
DISTRICT OF WEST TENNESSEE. }

The President of the United States to the City of Memphis, John Loague, Mayor, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and
23 S. B. Robbins, constituting the Board of Aldermen,

And P. J. Kelly, Herman Caro, William Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, jr., Richard Doherty, Wm. Gay, Charles G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon, T. A. Ryan and John Zent, constituting the Common Council of the City of Memphis, together composing the General Council of the said city—Greeting:

Whereas, by a petition duly sworn to, filed in Court here, it appears that on the 16th of March, 1875, Talmadge E. Brown recovered in this Court on the equity side of the city of Memphis the sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents ($292,133.47) and the costs of the suit, and that execution was ordered forthwith to issue therefor, and that the said execution has been duly issued and has been returned with the return of the Marshal in-
24 dorsed thereon: "after dilligent search no property to be found, returned without being further satisfied, by order of attorney for plaintiff."

And it appearing that the said city has no money with which to pay the said decree, and no property out of which it can be made, and has no means of paying the said decree except by levying a tax upon all taxable persons and property within the city, and that the debt for which the said decree was so pronounced accrued and became due from the city of Memphis as a part of the entire cost of paving portions of the public streets of the city, which paving was done under contracts made by the city in pursuance of ordinances of the city and acts of the Legislature of the State of Tennessee, whereby the city undertook and assumed to levy and collect from the property abutting the streets in which the paving was done, the costs
25 thereof, apportioning the same according to the frontage of the property on the streets paved; and after the said paving was done and accepted, and portions of the assessments levied for the payment of the cost thereof had been collected, and whilst a large balance of the cost thereof remained due and unpaid and before the 18th day of March, 1873,

the Supreme Court of the State of Tennessee decided that no right or power to make the said levy or assessment to pay for the said costs of the said pavement existed by law and that the attempt to do so was void, and that by the act of the Legislature of the State of Tennessee, passed on the 18th day of March, 1873, entitled an act to amend the charters of all the incorporated towns and cities in the State, as well as by other laws, full power and authority is given to the General Council of the city of Memphis to levy and collect a tax in addition to all other taxes authorized by law to be levied and sufficient in amount for the sole and exclusive purpose of paying 26 the entire cost of the said pavement so laid down, including the amount of the said decree; and that the city of Memphis and its general council, though often requested so to do, has wholly failed to levy the tax to pay the said decree or any part thereof, or otherwise to pay the same.

Now therefore this is to command you, the city of Memphis, and you the said Mayor, and you the said members of the Boards of Aldermen and Common Council and General Council, that you pay immediately in accordance with a decree of this Court entered herein on the 16th day of March, 1875, the amount of the decree aforesaid and the interest thereon and the costs of the suit, and in default thereof that you proceed to levy and collect each year for the ensuing three years, to-wit: 1875, 1876, 1877 respectively, a tax in addition to all other taxes sufficient in amount after making due allowance for all delinquencies, insolvencies and defaults 27 to realize one hundred and twenty-five thousand dollars ($125,000) each year, and to pay over the same in accordance with the decree of this Court entered herein March 16th, 1875, as fast as collected, or so much thereof as may be necessary for the purpose of satisfying the said decree, including the interest thereon and the costs, or appear in Court here at 10 o'clock a.m. on Friday, the 26th day of March, 1875, and show cause, if any you have, why you should not be required by the judgment of this Court to do so.

And this you shall in nowise omit, and do you then and there make due return of this writ.

Witness: HON. MORRISON R. WAITE,
Chief Justice of the United States.,
And the seal of the Circuit Court aforesaid and the signature of the Clerk this 22d day of March, 1875.

A true copy. [Signed] H. E. ANDREWS, *Clk.*

L. B. EATON, *United States Marshal.*

28 Executed by delivering the original writ, of which this is a true copy, to his honor John Loague, the Mayor of the city of Memphis, and by making known the contents and delivering a copy of the original writ hereof to Owen Dwyer, C. W. Metcalf, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and S. B. Robbins, members of the Board of Aldermen of the city of Memphis, and in like manner to P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, Jr., Richard Doherty, Wm. Gay, Chas. G. Fisher, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon, T. A. Ryan and John Zent, members of the Common Council of the city of Memphis, all on March 24th, 1875. After diligent search Nick Malatesta, Alderman, and J. L.

Carpenter, Councilman, not being found, I executed this writ upon them by leaving copies hereof at the last place of residence of each of
29 the last two on March 25th, 1875.

L. B. EATON, *U. S. M.*
W. KOCK, *Deputy.*

Answer of City filed March 26th, 1875.

TALMADGE E. BROWN
vs.
THE CITY OF MEMPHIS, JOHN LOAGUE, MAYOR, OWEN DWYER et al, COMPOSING THE GENERAL COUNCIL.

Now comes John Loague, Mayor, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and S. B. Robbins, of the Board of Aldermen, and P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, Jr., Richard Doherty, Wm. Gay, Chas. G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon, T. A. Ryan, and John Zent, of the Board of Councilmen, and altogether composing the General Council of the city of Memphis, and make return to the writ of man-
30 damus nisi issued out of this honorable Court, and not having obeyed the same they respectfully show the following reasons or causes why they have not done so. First, there is no money in the treasury, and the General Council of the city of Memphis has no power under the charter of said city to levy a greater tax than one per cent., or one dollar on the $100 of taxable property for all the purposes of government, including officers' salaries, police, fire, health and hospital departments, and the other current expenses of the city government, including the repair and improvement of streets, alleys, wharves, etc., etc. They have power to levy other taxes as follows: Two mills per cent. for interest on bonded debt of the city, 2½ mills per cent. for sinking fund to retire the bonds of the city, 1 mill per cent. for school and ½ mill per cent. for judgments. But the last named special taxes are required by law to be strictly applied for the purposes for which they are allowed to be
31 levied, and therefore they could not be applied to relator's claims. It is also made a misdemeanor for the respondents to apply said funds for any other than the purposes named by the law.

The one per cent. which the respondents are allowed to levy for general purposes they have already imposed, and therefore have exhausted their powers of taxation.

The act passed by the Legislature of Tennessee March 18, 1873, has since been repealed, and is not now the law of the State.

Respondents cannot now give the date of the act referred to in relator's petition, but it was passed at the present term of the Legislature, though not yet published.

Second, That the writ commands these respondents to levy a sum sufficient to raise $125,000 each year for three years, to-wit: the years 1875, 1876 and 1877, after making due allowances for all delinquencies, insolvencies and defaults, when in fact and in law the property of one
32 citizen cannot be taxed for the delinquency of any other citizen, and furthermore the decree in relator's favor is only $292,133.47, and the sum commanded by the writ to be raised is $375,000, or an excess of $83,133.47.

Third, By a mandate of this Court issued the —— day of June, 1873, the General Council of the city of Memphis levied a tax of 7 mills per cent. for the year 1873, and a tax of 3 mills per cent. for the year 1874 in favor of relator, and there is an uncollected balance on said levies of $170,000, all of which is on account of the relator's decree or claim now sought to be enforced, and which is being collected and paid over to him as fast as possible. There has been collected and paid over to him from said levies about $132,742.69, all on account of his said claim, and if respondents are required now to relevy the same burdensome tax on those who have paid it will be doing a great injury to the prompt taxpayer, and
33 will operate as an inducement to taxpayers to resist the payment of the tax.

Fourth, By the provisions of the law governing the city of Memphis there are certain wards, to-wit: the 9th and 10th wards, generally denominated as the new limits, which are exempted from the payment of any tax to pay for certain indebtedness of the city, and the writ does not show whether the indebtedness is one of the excepted classes or not, and the determination of this question is a judicial one which respondents cannot safely decide for themselves and should be determined upon the face of the writ.

Wherefore the respondents say they have not obeyed the writ, and they pray judgment whether they can do so upon the facts above stated.

G. A. HANSON, *City Att'y.*

34 Fifth, When the contract was made for the laying of said pavements by which the aforesaid debts became due to the relator, it was understood and stipulated that the owners of abutting property should pay for the pavement in front of each lot. And many persons paid for such pavement according to the terms of the contract, and when the act recited in relator's petition of March 18th, 1873, was passed it provided that such persons as had paid for the pavement and held receipts therefor might be excused or released from paying the tax levied to pay for such pavement. Wherefore respondents say they cannot levy and collect from all persons subject to pay taxes the tax as commanded by the writ, and therefore they cannot obey the writ.

Wherefore they pray judgment, etc.

G. A. HANSON, *City Attorney.*

John Loague, Mayor, makes oath that the foregoing return is true to the best of his knowledge and belief.

35 JOHN LOAGUE, *Mayor.*

Subscribed and sworn to before me this 26th day of March, 1875.

[Seal.] JAMES REILLY, *Clerk.*
By C. REILLY, *Deputy.*

Filed March 26th, 1875. H. E. ANDREWS, *Clerk.*

Indorsed as follows: 1874½, T. E. Brown vs. City of Memphis, John Loague et al. Filed March 26th, 1875. H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

"Answer of City."

36 DEMURRER

Filed March 26th, 1875, in the Circuit Court of the United States, District of West Tennessee:

THE UNITED STATES ON THE RELATION OF T. E. BROWN
vs.
THE CITY OF MEMPHIS AND OTHERS.

The petitioner demurs to the return herein filed, because—

1st. It presents no sufficient ground for the refusal by the defendants to do what the alternative writ of mandamus requires them to do.

2d. The act of the 18th of March, 1873, gave full power to levy the tax to pay the plaintiff's decree, and the Legislature if it has attempted to do so had no power to repeal the act so as to defeat the plaintiff's right 37 to require the levy of the tax.

3d. The Court cannot, in ordering a levy of taxes to pay the decree, consider past levies which have not been collected and may never be.

4th. As a matter of fact the debt due the plaintiff has accrued since the act of 1867; at any rate the defendants do not show it accrued before, and the constitution and law require all taxes to be equal and uniform, and that no one species of property shall be taxed higher or lower than other property of equal value and prevent the exemption of any property from taxation, and the action of March, 1873, makes no discrimination in favor of any person or class of persons.

5th. The constitution and the law require that taxes be levied upon the principles stated in the last paragraph and hence no account can be taken of the fact that some of those upon whom special assessments were laid to pay for the cost of the pavements laid down paid the assessments 38 levied upon them—the said special assessments were paid voluntarily and without lawful authority and constitute no defense to a lawful levy of taxes to pay the said decree. If the parties who have so paid have any equities they are against the city under the said act of 18th of March, 1873, and they are not against the petitioner.

T. E. BROWN, *in person.*

39 United States Circuit Court,

(WESTERN DISTRICT OF TENNESSEE.)

Proceedings had in the Circuit Court of the United States for the Sixth Judicial Circuit thereof, Western District of Tennessee, at a Regular Term of said Court, begun and held for its November Term, A. D. 1874, at the Federal Court Rooms in the City of Memphis, on to-wit: the 30th day of March, 1875, and days subsequent thereto, in the following Cause:

UNITED STATES ex. rel.
TALMADGE E. BROWN
vs.
THE CITY OF MEMPHIS.

The City of Memphis, John Loague, Mayor, S. B. Robbins, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle and G. A. Morti, constituting the Board of Aldermen, and John Zent, P. J. Kelly, Herman Caro, William Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Joseph Clouston, jr., Richard Doherty, William Gay, Charles G. Fisher,

J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon and T. A. Ryan, constituting the Common Council of the said city of Memphis, and together comprising the
40 General Council of said city.

This cause was this day heard upon the demurrer of the plaintiff to the return of the defendants to the alternative writ of mandamus herein issued, and it appearing to the Court that the said return presents no good cause for not complying with the requirements of the said alternative writ and that the said demurrer is well taken, it is ordered that the same be sustained and the said defendants saying nothing more in bar or preclusion of the remedy sought by the plaintiff, and it appearing to the Court that on the 16th day of March, 1875, the said Talmadge E. Brown recovered on the equity side of the Court here of the city of Memphis the sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents (292,133.47) and the cost of the suit, and that an execution has been issued on the said decree and has been returned, with the return of the Marshal thereon indorsed, to the effect that the city of Memphis has no property whereon to levy and that the execution is returned wholly unsatisfied; and it further appearing that the said city has no
41 money with which to pay the said decree and no property out of which
it can be made, and no means of paying the said decree except by levying a tax especially for that purpose, and that it possesses the power to levy and collect such a tax, and that though often requested so to do, the city of Memphis had wholly failed to pay the said decree or to levy or collect a tax for the purpose of paying the same. It is therefore considered, ordered and adjudged that the alternative writ of mandamus be made peremptory and final, and that the city of Memphis and its General Council proceed each year for the ensuing three (3) years, to-wit: 1875, 1876, 1877, respectively, at the same time, and in the same manner that other city taxes are assessed and levied and collected, to assess, levy and collect upon all the property within the city taxable by law a tax in addition to all other taxes allowed by law, payable in the lawful money of the United States of America, sufficient in amount, after making due allowance for all delinquencies, insolvencies and defaults, to realize one hundred and twenty-five thou-
42 sand dollars ($125,000) each year for the years 1875, 1876,
respectively, and so much of the said sum for the remaining year, to-wit: 1877, as may be required or necessary to pay and satisfy the balance of the said decree, including costs and interest not satisfied by the taxes collected and paid over during the two preceding years, and to pay over the same as fast as, and from time to time, as the same may be collected directly to the said Talmadge E. Brown, or into Court here, to be forthwith paid him without the further order of the Court until the whole amount of the said decree, including the costs of the suit and the interest that has accrued or may accrue thereon, be paid and discharged.

It is further ordered that the clerk of this Court, whenever the said Talmadge E. Brown shall request the same, issue each year, during the said years 1875, 1876 and 1877, respectively, a peremptory writ of mandamus in accordance with the foregoing judgment to be served on the city of Memphis and its Mayor and General Council in the manner prescribed by law, and it is ordered that the plaintiff recover of the defendant, the city of Memphis, the costs herein expended, and that execution issue therefor.

43 United States Circuit Court,

(WESTERN DISTRICT OF TENNESSEE.)

Proceedings had in the Circuit Court of the United States for the Sixth Judicial Circuit thereof, Western District of Tennessee, at a Regular Term of said Court, begun and held for its May Term, A. D. 1875, at the Federal Court Rooms in the City of Memphis, on to-wit: the 24th day of June, 1875, and days subsequent thereto, in the following Cause:

T. E. BROWN
versus } 147 Equity, and Law 1874½.
THE CITY OF MEMPHIS.

In the above cause it appearing to the Court that the city of Memphis having levied a special tax under the mandate of the Court is collecting and paying to the plaintiff or his agents the funds arising therefrom without having paid the costs of said cause. It is therefore, on motion, ordered that the mandate herein be so modified as to command the said city by its proper officers to pay the costs of these causes, amounting to the sum of fourteen hundred and twenty dollars and forty-eight cents, ($1,420.48) out of any funds now on hand or from the first that may hereafter be received from such collection, 44 and that a certified copy of this order be served upon said city of Memphis.

45 MANDAMUS.

Returned and Filed Sept. 30th, 1875.

UNITED STATES OF AMERICA, }
DISTRICT OF WEST TENNESSEE. }

The President of the United States to the City of Memphis, John Loague, Mayor, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and S. B. Robbins, constituting the Board of Aldermen,

And P. J. Kelly, Herman Caro, William Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, jr., Richard Doherty, Wm. Gay, Charles G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon, T. A. Ryan and John Zent, constituting the Common Council of the City of Memphis, and together composing the General Council of the said city—Greeting:

Whereas, it appears that on the 30th day of March, A. D., 1875, in this the Circuit Court of the United States for said District of West Tennessee, the cause of T. E. Brown vs. the City of Memphis came on to be 46 heard on the demurrer of the plaintiff to the return of the defendants to the alternative writ of mandamus herein issued. And it appearing to the Court that the said return presented no good cause for not complying with the requirements of the said alternative writ—and that the said demurrer is well taken. It was ordered that the demurrer be sustained, and the said defendants saying nothing further in bar or preclusion of the remedy sought by the plaintiff, and it appearing to the Court that on the 16th day of March, A. D., 1875, the said Talmadge E. Brown recovered on the equity side of this Court here, of the city of Memphis, the sum of two hundred and ninety-two thousand one hundred and thirty-three 47-100 dollars and the costs of this suit.

And that an execution has been issued on the said decree, and has been
returned with a return of the Marshal indorsed thereon, to the effect that
the city of Memphis has no property whereon to levy and that the execu-
tion is returned wholly unsatisfied, and it further appearing that the said
city has no money wherewith to pay the said decree and no property out of
which it can be made, and no means of paying the said decree ex-
47 cept by levying a tax specially for that purpose, and that it possesses
the power to levy and collect such a tax, and that though often re-
quested so to do, the city of Memphis has wholly failed so to pay said de-
cree, or to levy or collect a tax for the purpose of paying the same. It was
therefore considered, ordered and adjudged that the alternative writ of
mandamus be made peremptory and final, and that the city of Memphis and
its General Council proceed each year for the ensuing three (3) years, to-
wit; 1875, 1876, 1877, respectively, at the same time and in the same man-
ner as the other city taxes are assessed, levied and collected, to assess, levy
and collect upon all the property within the city taxable by law, a tax in
addition to all other taxes allowed by law, payable in lawful money of the
United States of America, sufficient in amount, after making due allowance
for all delinquencies, insolvencies and defaults, to realize one hundred and
twenty-five thousand dollars ($125,000) each year for the years 1875, 1876,
respectively, and as much of said sum for the remaining year, to-wit: 1877,
as may be required or necessary to pay and satisfy the balance of the
48 said decree, including interest and costs not satisfied by the taxes
collected and paid over during the two preceding years, and to pay
over the same as fast as, and from time to time, as the same may be collected,
directly to the said Talmadge E. Brown, or into Court here, to be forthwith
paid him without further order of the Court, until the whole amount of the
said decree, including the costs of the suit and the interest that has accrued
or may accrue thereon, be paid and discharged.

Now therefore, this is to command you, the said city of Memphis, and you, the said Mayor, and you, the said members of the Board, Aldermen and Common Council and General Council, that in accordance with the said decree you proceed to assess, levy and collect a tax upon all the taxable property of the city of Memphis, in addition to all other taxes allowed by law, sufficient in amount, after making due allowance for delinquencies, insolvencies and defaults, to realize one hundred and twenty-five thousand dollars, ($125,000), and pay over the same in accordance with the above recited decrees of this Court, and that you make due return of this writ on the 4th Monday of November next.

Witness the Hon. MORRISON R. WAITE, Chief Justice
[SEAL.] of the Supreme Court of the United States, and
49 the seal of the said Circuit Court this 28th day of
June, A. D., 1875.

[L. S.]

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

RETURN.

"Came to hand June 29, 1875. Executed by reading the original in the presence of the members of the Common Council, and also in the presence of the members of the Board of Aldermen which assembled by the General Council, and by leaving the original, of which this is a true copy, with Hon. John Loague, Mayor, &c., on the 29th day of June, 1875.

"L. B. EATON, *U. S. M.*
"F. H. TORBITT, *Deputy.*"

Endorsed—Returned and Filed September 30th, 1875.
H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

50 RETURN TO MANDAMUS.

Filed Feb. 9th, 1876.

T. E. BROWN & CO.
vs.
THE CITY OF MEMPHIS
AND THE GENERAL COUNCIL THEREOF.

In the Circuit Court of the United States, for the District of West Tennessee:

The city of Memphis and the General Council thereof, by its attorney, comes, and for return to the peremptory writ of mandamus issued out of this Court on the 22d day of March, 1875, it says:

On the 10th day of December, 1875, the General Council of the city of Memphis passed an ordinance, a copy of which is hereto appended, marked Exhibit "A." and prayed to be taken as part of this return. Respondent further states that it is proceeding, and will proceed, to collect said tax and apply the same as required by said writ, as rapidly as possible and by all the means that the laws of the State afford for that purpose. Respondent further states as a reason why it did not sooner proceed to levy and collect the tax as required by said writ: that on the 20th day of March, 1875,
51 the Legislature of the State of Tennessee passed an act by which it
was required that the assessments of "real and personal property" of such city (meaning the city of Memphis) "by the State or County Tax Assessor" for State and County "purposes shall (should) be the "assessment for city purposes."

Said act took effect from the date of its passage and respondent was compelled thereby to await the assessment for State and county purposes before it could proceed to levy any tax for city purposes.

On the 7th day of December, 1875, a duly authenticated copy of the assessment for State and county purposes and also the necessary books to enable the City Tax Collector to proceed with the collection of taxes for city purposes were delivered to said Tax Collector.

Thereafter, to-wit: on the said 10th day of December, 1875, respondent by its General Council did levy the tax and is now proceeding to collect the same as required by said writ.

2. Respondent in order to evoke the judgment of this honorable Court for its own guidance in the matter of levying this tax, and in order that it may understand its powers and duties in the premises, further states and shows:

52 By an act of the Legislature of the State of Tennessee passed on the 3d day of December, 1867, and printed on pages 65 and 66 of the published acts of said Legislature for the years 1867 and 1868 (to which reference is here made) certain new territory was added to the corporate limits of the city of Memphis and designated as the 9th and 10th wards of said city.

By an act of said Legislature passed on the 1st day of December, 1869, it was enacted that "the people residing within the limits of the addition "made to the city of Memphis by the acts of 1867 (meaning the act above "referred to) shall not be taxed to pay any part of the debt of the city or "interest thereon contracted prior to the passage of said act of 1867."

In the months of March and July, 1867, the city of Memphis entered into contracts with Messrs. Forrest, Mitchell & Co. and Taylor, McBean

& Co., by which the latter undertook to pave certain streets of the city with what is known as the "Nicholson pavement."

Respondent appends a copy of one of said contracts, marked Exhibit B., and prayed to be taken as part of this petition.

The other contracts, in all respects material to this question, were similar to the one exhibited. Under these contracts many of the streets
53 of the city were paved with the Nicholson pavement. Some portion of said paving was done before, but much the greater portion was done after, the passage of said act of December, 1867. Respondent cannot now state the exact proportion of paving done before and after the passage of said act.

Respondent further states that the original paving contracts made with Forrest, Mitchell & Co. and Taylor, McBean & Co. were on the 2d day of June, 1868, transferred to T. E. Brown & Co. Said transfer was made by consent of the city of Memphis, and T. E. Brown & Co. were required to give, and did give bond to the city conditioned for the faithful performance of the work of paving according to the terms of the contract.

Respondent appends hereto a copy of the proceedings of the Board of Mayor and Aldermen of said city in reference to said transfer, marked Exhibit "C.," and prayed to be taken as part of this return.

Upon this state of facts respondent submits to the Court the questions—

1. Was the debt upon which T. E. Brown & Co. recovered their judgment against the city of Memphis, upon which judgment this writ of mandamus was issued, contracted within the meaning of the act of 1869
54 when the paving contracts were executed in March and July, 1867; or was it contracted as each section of the work was completed, and the price thereof payable according to the terms of the contract?

2. If the date of the contract determines when the debt was contracted, did the city enter into a new contract with T. E. Brown & Co. on the —— day of ——, 1868, when the paving contracts were transferred to them?

The judgment in favor of T. E. Brown & Co. upon which this mandamus proceeding is based was recovered for the balance due to them for work done and materials furnished under the paving contracts and the transfer thereof hereinbefore referred to.

Respondent further states that during the entire period from the date of the execution of the first of said paving contracts until the work of paving was completed and ended the charter of the city of Memphis required that at least two-thirds of the taxes upon realty collected from any ward of the city should be expended within that ward; and that no part of the pavements laid under said contract was laid in the territory added to the
55 city by the said act of December, 1867.

Under these facts respondent has been enjoined from levying any tax upon the territory so as above added to the city limits by the courts of the State of Tennessee for the purpose of paying the said judgment recovered by Brown & Co.

And respondent submits to this Court the question of its power and duty in the premises.

Respondent for further answer says that by the terms of said paving contracts the costs of said paving was to be borne by the owners of the lots abutting on the streets to be paved according to the frontage of the lots on said streets, said costs to be paid by a specific assessment on each lot and the owner thereof, one-half to be paid in cash on the completion of each section of the pavement and the other half in 30, 60 and 90 days thereafter in equal installments.

This mode of payment was adopted by the city under an act of the Legislature passed November 24, 1866.

As sections of the pavement were from time to time completed a large
number of owners of the lots abutting on said streets paid to the
56 contracters the entire costs of grading, paving, etc., in front of their
respective lots.

Other owners of abutting lots refused to pay as required by the act of the Legislature and by the terms of the contracts, and being sued therefor it was finally determined by the Supreme Court of Tennessee that the said act of November 24, 1866, so far as the same authorized the city to compel the owners of the abutting lots to pay the entire costs of paving, grading, etc., in front of their respective lots, was unconstitutional and void, and that the money to pay for said paving must be raised by a general tax.

Soon after the rendition of this judgment T. E. Brown & Co. brought suit against the city for the balance due to them under said paving contracts, and in that suit they recovered against the city the judgment upon which this mandamus proceeding is based.

On the 24th day of March, 1873, by an act of the Legislature the city of
Memphis was empowered to levy a tax in addition to all other taxes allowed
by law to be levied sufficient to cover the entire costs of said paving, grad-
ing, etc., for which said special assessments had been illegally made and
collected, and to allow as valid payments on said additional tax any
57 sum or sums with interest paid by persons in satisfaction or in part
satisfaction of said special assessments illegally levied and col-
lected as aforesaid.

After the passage of this act the said city of Memphis passed an ordinance by which the Mayor thereof was authorized "to issue to each and "every person or corporation holding the receipt of the contractors or the city "for payments actually made upon bills or accounts certified to be correct "by the City Engineer for or on account of paving the streets and alleys "of the city with the Nicholson or stone pavement, under the provisions "of the city charter and the ordinance of the city charging the costs of "such paving upon the property in front of which the pavement was laid "(which provision of the charter and ordinance have been held by the "Supreme Court of Tennessee to be unconstitutional and void), a certificate "of indebtedness, under seal of the city and countersigned by the Register, "for the amount of money actually paid upon such receipt with interest "thereon at the rate of six per cent. per annum from the date of payment "until said certificate may be redeemed by the city."

58 By another section of the same ordinance it was provided that the
"certificates of indebtedness to be issued under this ordinance shall
"be received at their face value and interest in payment of any tax that
"may hereafter be levied by the city of Memphis to cover the entire costs
"of laying the Nicholson and stone pavement."

The city of Memphis accordingly issued a large number of certificates of indebtedness, as provided by said ordinance, and receivable for taxes as therein provided.

A copy of one of said certificates is hereto appended and marked Ex- "D." and prayed to be taken as part of this return.

By a subsequent ordinance the Mayor was authorized to call in and redeem said certificates and in lieu thereof to issue what were denominated change warrants, and a large number of such change warrants were accordingly issued in the form shown by a copy of one of them hereto appended as part of this return, marked Exhibit "E."

A large amount of said certificates and change warrants are still outstanding unredeemed.

On the 20th day of March, 1875, the said act of March 24th,
59 1873, was repealed.

Under this state of facts bills have been filed in the State courts to enjoin the city from levying any tax to pay for the pavements on the property of those who have already paid to the contractors.

And it is also claimed that in payment of any tax levied or to be levied for that purpose, the city must receive the said certificates and change warrants.

Respondent filed herewith a copy of the bill filed against it in the State Courts, as exhibit F. hereto, containing a detailed statement of the facts and legislation on this question, and which, so far as it is a statement of facts and not mere inference of fact, or law is substantially true.

Respondents ask the judgment of this Hon. Court as to their rights and duties in the premises.

Respondents would also refer to the copy of paving contract hereinbefore contained, and would state that the judgment of T. E. Brown & Co. upon which this mandamus is based was recovered upon the guaranty of the city contained in said contract for paving.

Respondents further say that if the property in the territory added
60 to the city by the act of Dec. 1867, and the property of those who
paid under special assessment as aforesaid, or of those who held the said certificates of indebtedness or change warrants, he held exempt from any tax to pay this judgment, then the levy made by respondents is insufficient to raise the amount of money required to be raised by this writ of mandamus.

S. P. WALKER, *City Attorney.*

Filed Feb'y 9, 1876. H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

Be it resolved, That a special tax of 54 cents on the $100 worth
61 of property be and the same is hereby levied for the 48th Corporate
year for the purpose of paying one hundred and twenty-five thousand dollars of the judgment rendered by the United States Circuit Court in favor of T. E. Brown against the city, as required by the writ of mandamus heretofore served upon us.

Adopted by Aldermen and Council December 10, 1875.

Approved Dec. 14th, 1875. JOHN LOAGUE, *Mayor.*

The above is a true copy from the Ordinance Book in my office, this April 23, 1876. CRABTREE BELCHER, *City Register.*

Indorsed—1874½, Circuit Court of the United States, Western District of Tennessee—T. E. Brown vs. City of Memphis.

Exhibit A to Return of the City.

Filed Feb'y 9th, 1876. H. E. ANDREWS, *Clerk.*
By L. H. PILLSBURY, *D. C.*

62 *Exhibit B.*

STREET PAVEMENT, 1867, No. 1.

FORM OF AGREEMENT,

To be executed in duplicate, for regulating and paving with Nicholson pavement the carriage way of Beal street from Shelby street to Wellington street, inclusive. For grading and for laying and relaying curb-stones, etc.

This agreement, made and concluded this sixteenth day of July, in the year of one thousand eight hundred and sixty-seven, by and between the

Mayor and Aldermen of the city of Memphis, County of Shelby, and State of Tennessee, of the first part, and Forrest, Montgomery & Co., composed of N. B. Forrest, J. E. Montgomery, Joseph Mitchell and F. G. McGavock, contractors, of the second part,

Witnesseth: That the said parties of the second part agree, for consid-
erations hereinafter mentioned and contained, and under a penalty
63 expressed in a bond bearing even date with these presents, and hereto
annexed, to furnish at their own proper cost and expense, all the
necessary material and labor, and in good, firm and substantial manner reg-
ulate and pave with Nicholson pavement the carriage way of Beal street, from Shelby st. to DeSoto street, including the intersecting streets and alleys to the line of said Beal street. And to lay and relay curb-stones as required, in the manner and under conditions hereinafter specified; and have further agreed that the Corporation shall be and are hereby authorized to appoint such person or persons as they may deem proper to inspect the materials to be furnished and the work to be done under this agreement, and to see that the same corresponds with the specifications hereinafter set forth, to-wit:

SPECIFICATIONS.

1. All material furnished and all work done which, in the opinion of the
appointed agents of the corporation, shall not be in accordance with the
specification, shall be immediately removed, and other materials fur-
64 nished, and work done that will be in accordance therewith; and in
case of the neglect or the refusal of the contractors to immediately
remove improper material, the same to be removed by the corporation at the expense of the contractors, said expenses to be deducted from the account of the contract.

2. The work under this agreement to be prosecuted at and from as many different points in such part or parts of the street on the line of the work as the said agents of the corporation may from time to time, during the progress of the work, determine; and at each of said points an inspector will be placed on the day designated for the commencement of the work thereat. Proper fences and guards are to be erected at night, and a sufficient number of lights kept burning on or near the work from twilight in the evening until sunrise.

The right to construct sewers or to lay or repair gas pipes on the line of
the said street, at any time prior to the laying of the pavement, is
65 expressly reserved by the agents of the corporation, and said con-
tractors shall not interfere with or place any impediment in the way
of any person or persons who may be engaged on said work; except that the work done under this contract is not to be delayed for the last aforementioned work.

It is understood that all prior contracts for paving will take precedence as to the intersections of streets or alleys, and that the paving under this contract stops at the line of said intersecting streets and alleys, with the exception of Main street.

3. Grading.—The surface of the street is to be cut to the proper grade and curve as directed by the City Engineer. That portion of the street on which remains three inches or more of gravel, after said cut, is to be graded seven inches below the surface of the pavement, and the surface of the same
is to be shaped with three inches in depth of clean gravel or sand entirely free
from clay or vegetable matter, and such portion or parts of said
66 street on which there remains less than a uniform bed of gravel, three
inches deep, are to be graded ten inches below the top of the pave-

ment when completed, and filled with a uniform bed of gravel or sand not less than three inches. All superfluous earth, gravel or sand from the grading to be removed and placed by the contractor, at his own expense, at such points as may be designated by the improvement committee, not exceeding a distance of five hundred yards from the line of the work.

All brick and stone gutters to be taken up by the contractor, at his own expense, and removed by the Street Commissioner.

4. BALLASTING.—The ballasting hereinbefore referred to is to be clear, uniform in character, containing no pebbles of larger diameter than one inch, and smoothly rounded to the shape of the street, as directed by the Engineer.

67 5. FLOORING.—The entire carriage way from curb to curb to be covered with entire white pine, good heart cedar or cypress boards—not less than one inch in thickness—the ends of the same to rest on stringers of the same material, not less than ten inches wide, placed transversely. All to be properly covered on both sides with pure hot coal tar.

The whole evenly laid to such crown and grade as from time to time may be given by the Engineer.

6. BLOCKS.—Rows of sound, three inch white pine, good heart cedar or cypress blocks, free from sap, loose or decayed knots, or other defects, six inches long, placed on end upon the flooring—the rows running across the street, except at street intersections, at which the blocks are to be placed diagonally at an angle of forty-five degrees, diverging from the point of intersection at the center line of each street. The blocks in every row to break
joints in a similar manner as in brick masonry; said blocks to be
68 sawed from 3 inch plank or joist; no blocks to be laid in the pavement
less than 5 inches or more than 10 inches wide.

It is expressly understood that the City Engineer or Inspector or other agent of the corporation reserve the right to examine the lumber before it is sawed into blocks, as also the blocks, and to refuse any or all lumber brought in the street for the above purposes, especially if the appearance of the same shows that they have been cut off dead logs; that is to say, logs that have been exposed to the weather for such a length of time before having been sawed as to take the vital strength from the same. Said blocks are to be separated by strips of boards or pickets, said pickets to be of uniform thickness of three-quarters of an inch and of a uniform width of three inches, and not more than four feet long, placed on edge between the
rows, and each and every strip or picket to be nailed to the blocks
69 by two ten-penny nails to prevent their working up. The blocks
shall be fitted transversely so as to make close joints, and shall be culled and assorted so as not to vary in thickness in each row. Providing any decay, sap or other defect is discovered the same is to be trimmed off and the rows, both of the blocks and of the strips, are to be laid closely together. All the blocks after inspection are to be dipped two-thirds of their depth in hot tar; and it shall be the duty of the inspector to be present at all times during the process of said work and examine every block and to reject all that do not conform strictly with the requirements of this specification.

The spaces or joints between the rows of blocks and above the strips shall be filled with clear screened roofing gravel and a composition of tar equal to the best now used for such purposes, thoroughly mixed and com-
pactly rammed down by means of a paver's rammer and an iron
70 blade prepared to fit the joints, the blade to be 5/8 in thickness,
which blade is to be moved only one-half of its length at a time

while ramming, so that all parts of the same shall be thoroughly rammed, but no rammer shall be applied within 25 feet from the work progressing or not ready to be rammed, the blade not to exceed eighteen inches in length. The gravel shall be applied thoroughly dried and kept heated enough not to chill the tar, and shall be composed of small pebbles of the size from that of peas to that of one-half (½) inch diameter and free from particles or sand which may prevent the tar from penetrating.

All the tar used in the joints shall be so boiled down and thickened that when cool it shall be tough and fibrous without liability to become brittle in cold weather, and shall be equal in quality to that used in all Western cities.

It is hereby expressly understood that there shall be no raw coal tar used in filling the spaces or joints between the blocks on said improvement, but
the clear composition above named; said composition to be applied
71 hot, and in such quantities as to fill and penetrate the joints, using
for that purpose at least two gallons of composition to every square yard of pavement.

The whole surface shall be thoroughly sprinkled with a mixture of the aforesaid composition and coal tar heated, and immediately covered with roofing gravel and common river sand, mixed in about equal proportion, and not less than three-quarters of an inch thick.

It is expressly understood that the swabbing of the boards under the blocks and the top sprinkling of the pavement is not included in the above enumerated amount of tar. The aforesaid mixture of composition and coal tar for the swabbing and sprinkling shall consist of one-half of each kind, the contractor to submit samples of the tar and composition proposed to be
used to the agents of the corporation for approval, and that actually
72 used to be equal in quality to the samples that may be approved.

7. Grade.—The top of the wooden blocks at the curbstones to be at such distances below the angle of the curb of the sidewalks as may from time to time be determined by the City Engineer; also the slope and depression of the gutters to be determined by the Engineer with reference to the volume of water to be carried.

The crown of each at the point of intersection of the central line of streets to be three inches higher than the crown on the general line of the streets, and the formation of all curves from the gutters or from the curbs to be determined by the Engineer as the work progresses.

The contractor is also to make the proper connection of the gutters of intersecting streets and alleys as directed by the City Engineer without extra charge therefor.

When the pavement terminates on the line of the street to be paved
under this contract on intersecting streets or alleys (which are not at
73 present paved) there are to be wooden curbs, four inches thick and
fourteen inches wide, composed of the same material as the block, and firmly set in the ground and properly secured to prevent thrusting outward during the process of ramming the pavement.

Where gullies, wells, traps and man-holes are required for the purpose of the means of access to gas pipes along the line of the streets, the same is to be constructed by the Memphis Gas Light Co. without expense to the contractor, except that the contractor is at his own proper expense, to properly fit the pavement around and connecting with the same.

9. Culverts.—All culverts that may be required to take water across the street which is to be paved to be constructed of good heart cypress, and of the dimension of the present culverts, the walls to be not less than four

inches in thickness, and the bottom and top to be planked with cy-
74 press planks, three inches thick, except that where it is found practi-
cable, the block pavement will extend over the culvert, as deter-
mined by the City Engineer.

The surface of all culverts will be measured as pavement. The stone work in the present culverts to be considered the property of and to be taken up and removed by the corporation or their agents.

All gutters to connect with the culverts as directed by the City Engineer.

10. Curbing.—All new curbings that may be required for sidewalks
along the line of the street are to be composed of either good limestone of
approved quality or fine grained Ohio river blue freestone, from the
"Buena Vista" quarry, to be not less than five inches in thickness
and sixteen inches deep, and in length of not less than three or
75 more than eight feet.

The top and eight inches deep of the face and four and one-half inches of the back to be properly hammer dressed, and the outer iris to be rounded with a radius of three-quarters of an inch, the joints to be close to a point not less than two inches below the top of the pavement.

All curbstones at the angles of the pavement, at the intersection of streets and alleys, to be of solid blocks, and those at the intersection of streets to be rounded with a radius of twelve inches. Before furnishing any new curbing the contractor shall submit to the agents of the corporation samples of the stone proposed to be used for approval, and the curbing furnished shall be equal in quality to the samples that shall have been approved.

All of the stone curbing that is now set on the line of the street that is
determined to be of proper quality and dimensions, but is not in
76 proper position, as to line of grade is to be reset by the contractor
under the direction of the City Engineer.

The curbing is to be properly set on a good foundation properly secured.

Where sidewalk pavements require changes or repairs on account of changes of curbing or the setting of new curb the same is to be done by and at the expense of the abutter.

11. Man-holes.—All man-holes and caps for the public cisterns on the line of the street are to be changed by the contractor, and carried not less than 20 inches outside of the track of the street railroad. The present apertures are to be properly closed with brick masonry and new ones made of the proper diameter, and gulleys with nine inch brick wall built at a proper inclination from the same to the pavement, all laid in cement.

The cistern caps will be furnished by and at the expense of the cor-
poration; but the contractor is to set the same and properly fin-
77 ish the pavement connecting with the same, under the directions
of the City Engineer.

The present cistern caps on the line of the work are to be considered the property of and to be taken up and removed by the corporation or their agents.

12. Clearing Up.—All surplus material, earth, sand and rubbish of all kinds, are to be removed from the line of the work as rapidly as the work progresses, or the work will not be considered completed according to the agreement.

13. All loss or damage arising out of the nature of the work to be done under the contract or agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the

same, or from the action of the elements during the prosecution of the
work, or from encumbrances on the line of the work, to be sus-
78 tained by the aforesaid contractor.

14. The prosecution of the work to be suspended at such time and for such periods as the corporation or their agents may determine, but if suspended for no fault of the contractor then the corporation to be liable for the suspension in damages to be ascertained by third parties.

15. It is expressly understood that the work is to be prosecuted in sections of not less than the space between two intersecting streets, and that the work of inspection shall apply to the work on each of said sections on the whole line of the work.

16. Whenever the word "contractor" and the words "party of the
second part" and pronouns in the place thereof are used in the contract,
they are to be considered as referring to and meaning the party
79 or parties, as the case may be, of the second part, to this agree-
ment.

17. And the said party of the second part hereby agrees that the said party of the first part shall be, and they are hereby authorized to retain out of the moneys payable to him under this contract the certain sum of ten cents for each square yard of pavement constructed under this agreement, and to expend the same in the manner hereinafter provided for, in making such repairs to the work done under this agreement as the said corporation or their agents may deem necessary.

And it is further agreed, that if at any time during the six months, from
and after the date of the acceptance of this work by the agents of the cor-
poration, the said work or any part or parts thereof, (excepting such part
or parts thereof as after the completion of the same may have been disturbed
by the construction or repairs of sewers, drains, or in laying or re-
80 pairing gas pipes) shall, in the opinion of the agents of the corpora-
tion, require repairs; and the said agent shall notify the said party
of the second part to make the repairs so required; the said party of the
second part will immediately commence and complete the same to the sat-
isfaction of said agents; and in case of failure or neglect on his part so to
do, within three days from the date of the aforesaid notice, that then the
said agents shall have the right to purchase such materials as they may deem
necessary, and to employ such person or persons as they may deem proper,
and to undertake and complete the said repairs, and to pay the expense
thereof out of the said certain sum retained for this purpose by the parties
of the first part, as before mentioned. And the parties of the first part
hereby agree that upon the expiration of the said period of six
months, provided that the whole work shall at that time be in good order,
which shall be determined by a certificate to that effect, signed by
81 the City Engineer and indorsed by the Mayor, to pay to the said
party of the second part the whole or such part of the same last
aforesaid as may remain after the expense of making said repairs in the
manner aforesaid shall have been paid therefrom.

[A]

The said party of the second part further agrees, that the return of the City Engineer, indorsed by the Mayor, shall be the account by which the amount of work done shall be computed, and that he shall not be entitled to demand or receive payment for any work upon in or about the said work or extra work, unless ordered in writing by the said agents of the corporation to do the same as extra work, and a price therefor agreed upon previously to its commencement.

82 The party of the second part agrees, and they hereby authorize the parties of the first part to reserve the right to make any changes in the work to be done under this contract, or in the material used therefor, which they from time to time, during its progress, may deem expedient; and the contractor, upon notice of said changes to be made, is to proceed as directed by said notice, and the value of said changes (either in increasing the cost of the work to be done under this contract, or of the materials employed therefor or diminishing the same) to be estimated in proportion to the contract price of work and materials of the like nature done under this contract, and the value of said changes to be added to the amount to be paid under this contract, or deducted therefrom, as the case may be, and that said changes shall in no way vacate or render void the conditions of this contract.

[B]

83 The said party of the second part hereby further agrees that he will commence the aforesaid work on or before the second day of Sept. 1867, and at such point or points as said agents of the corporation may designate, and fully complete the same in accordance with this agreement on or before the expiration of the first day of January next, thereafter, Sundays, holidays and such other days on which the prosecution of the whole of the work in accordance with the provisions of this agreement is in consequence of the weather, and as provided in Section 14, necessarily suspended, to be excepted.

Also, that he will give his personal attention to the work, and that he will not sublet the aforesaid work but will keep the same under his personal control, and that he will punctually pay the workmen who shall be employed on said work in cash current.

[C]

84 And the said party of the second part hereby further agrees that the said parties of the first part shall be and they are hereby authorized to deduct and retain out of the moneys which may be due or become due to the parties of the second part under this agreement, the sum paid to the inspector or inspectors, as wages for each and every day the aggregate time of the inspectors may exceed the time hereinbefore stipulated for the completion of the whole work under this agreement.

[D]

85 The said party of the second part further agrees that if at any time the said agents of the corporation shall be of the opinion, and shall so certify in writing, that the said work or any part thereof is unnecessarily delayed or that the said contractor is wilfully violating any of the conditions or covenants of this contract, or is executing the same in bad faith, they shall have the power to notify the aforesaid contractor to discontinue all work under this contract or any part thereof, and thereupon the said contractor shall cease to continue said work, or such part thereof; and the said agents of the corporation shall thereupon have the power to place such or so many persons as they may deem advisable, by contract or otherwise, to work at and complete the work herein described, or any part thereof, and to use such materials as they may find upon the line of said work or to procure other materials for the completion of the same, and to charge the expense of said labor and materials to the afore-

said contractor, and the expense so charged shall be deducted and paid by
the parties of the first part out of such moneys as may be then due, or may
at any time thereafter grow due to said contractor under and by virtue of
this agreement, or any part thereof; and in case such expense is less
86 than the sum which would have been payable under this contract if
the same had been completed by him, he shall be entitled to receive
the difference, and in case such expense shall exceed the last said sum, he
shall pay the amount of such excess to the parties of the first part on notice
from said agents of the corporation of the excess so due.

[E]

And the said party of the second part hereby further agrees that he will
furnish to the said agents of the corporation satisfactory evidence that all
persons who have done work or furnished materials under this agreement,
or who may have received or sustained any damage or injury through or by
reason of any act, omission, carelessness or want of skill on the part of said
contractor or his agents in prosecution of the work aforesaid, and who
have given written notice to said agents of the corporation, before or
87 within ten days after the completion of the work aforesaid, that any
balance for such work or materials or compensation for such damage or injury is still due and unpaid, have been fully paid or secured; and
in case such evidence be not furnished as aforesaid such amount as may be
necessary to meet the claims of the persons aforesaid shall be retained
from the moneys due the said party of the second part under this agreement, until the liabilities aforesaid shall be fully discharged, or such notice
withdrawn.

[F]

And the said party of the second part further agrees that he will indemnify and save harmless the parties of the first part from all suits or actions
of every name and description brought against them for or on account of
any injuries or damages received or sustained by any party or
88 parties by or from the said party of the second part, his servants or
agents in the prosecution of said work, or by or in consequence of
any negligence in grading the same, or of any improper materials used in
its prosecution, or by or on account of any act or omission of the said
party of the second part or his agents. And the said party of the second
part hereby further agrees that the whole or so much of the money due to
him under and by virtue of this agreement as shall or may be considered
necessary by the agents of the corporation shall or may be retained by the
said parties of the first part, until all such suits or claims for damages as
aforesaid shall have been settled, and evidence to that effect furnished to
the satisfaction of said agents of the corporation.

And the said party of the second part hereby further agrees to
89 receive the following prices as full compensation for furnishing all
the materials and labor which may be required in the prosecution
and completion of the whole of the work to be done under this agreement,
and in all respects completing the same in the manner before specified, to-wit:

For each square yard of pavement laid, the sum of *Five Dollars and fifty-five cents ($5.55).*

For each lineal foot of new curb-stone furnished and laid, the sum of *One Dollar and seventy-five cents (1.75).*

For each lineal foot of curb that is reset, the sum of *Twenty cents (20c.)*

It being expressly understood that the measurements shall be taken after

the laying or setting of the blocks, and that the aforesaid prices cover the furnishing of all the different materials and labor and the performance
90 of all the work mentioned in this specification and agreement.

In consideration of the full and faithful performance of each and every of the agreements herein contained on the part of the party of the second part, the parties of the first part agree to pay or cause to be paid to the party of the second part the prices hereinbefore mentioned.

The estimates of the City Engineer on the number of the superficial yards of paving shall be based upon the measurement called for by the deeds of the abutters and shall be considered as a finality in settlement with the contractor.

TERMS OF PAYMENT

as follows, to-wit: Upon the completion of each section the contractor shall receive from the city the whole amount due under the conditions
91 of this contract for said section, the same to be paid in Memphis City Paving Bonds, payable in five, ten and fifteen years, in equal proportions, with six per cent. coupons attached, payable semi-annually, principal and interest guaranteed and provided for by a sinking fund set aside for that purpose. Bonds to be taken at par.

The privilege to use the Nicholson pavement is secured by the city for the use of the contractors and the sum of twenty-five cents per yard is to be deducted from the contract price for paving for the purpose of paying for said privilege and for contingent expenses.

The sections shall not be less than three hundred and twenty-five (325) feet nor more than four hundred (400) feet in length.

In witness whereof, The parties to these presents have hereunto set their hands and seals the day and year first above written.

92 *Exhibit C.*

MAYOR'S OFFICE,
MEMPHIS, June 2, 1868.

PAVING COMMITTEE.

The Committee submitted the following report, and the same was adopted by the Boards:

REPORT.

The Committee to whom was referred the petition of Taylor, McBean & Co., Abe and A. J. McBean, and Taylor, McBean & Baldwin to have transferred to T. E. Brown & Co., a firm composed of T. E. Brown and J. Langdon, all of their contracts made with the city of Memphis for grading and paving certain streets in the city, report that the transfer be made to the said T. E. Brown & Co. of those contracts first made by the city with Taylor, McBean & Co., and those transferred by the city from Forrest, Mitchell & Co. to Taylor, McBean & Baldwin, to embrace all the unfinished streets contained in these contracts and none other, as
93 well as all the unsettled and unadjusted claims due the contractors by the property holders and city; provided that the said T. E. Brown & Co. will execute bonds at their own cost with satisfactory security in place of those given by said parties, or get the written consent of the securities to the first bonds to stand pledged for said T. E. Brown & Co. to carry out the contracts as made with the first parties.

Filed as of Feb'y 9, '76.

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

Exhibit D.

To return of the city filed Feb'y 9, 1876.

CERTIFICATE OF INDEBTEDNESS.

No. 902.

MAYOR'S OFFICE,
MEMPHIS, TENNESSEE.

The City of Memphis is indebted to——— ——— ———or order in the sum of ——— ———dollars, to bear interest at the rate of 6 per centum per annum from the ——— day of ———, 186—, until this certificate is redeemed. This certificate is issued under the provision of an ordinance approved the 29th day of June, 1873, passed in accordance with an act of the Legislature approved on the 24th of March, 1873, authorizing the Mayor to issue certificates of indebtedness to persons holding receipts for payments made for laying of the Nicholson and stone pavement in the streets and alleys of the city under the provisions of the charter and ordinances of the city which have been held by the Supreme Court to be unconstitutional, and is receivable only in payment of any tax that may be levied by the city of Memphis to cover the entire cost of laying the said pavements. 94

Witness the signature of the Mayor and the seal of the city this ——— day of ———, 1873.

———————————, *Mayor.*

Attest:

———————————, *City Register.*

Indorsed—Circuit Court of the United States, Western District of Tennessee. Filed Feb'y 9th, 1876.

H. E. ANDREWS, *Clerk.*

95 "*Exhibit E.*"

No. 1859. STATE OF TENNESSEE, "1."

CITY OF MEMPHIS,

Receivable for tax levied and to be levied to reimburse those who have paid for Nicolson or Stone pavement, and for no other dues.
Ordinance passed Feb. 12, 1874.

Is indebted to Certificate No. 844, given for

PAVING RECEIPTS

ONE DOLLAR,

Bearing interest at the rate of six per cent. per annum, from the 19th day of Sept. 1867, until redeemed.

Witness our hands this 28th day of August, 1874.

M. T. WILLIAMSON, Register.
JNO. LOAGUE, Mayor.

Endorsed—Filed Feb'y 9th, 1876. H. E. ANDREWS, *Clerk.*

96 *Exhibit F.*

To return of city to peremptory writ of mandamus. Filed February 9, 1876.

H. E. ANDREWS, *Clerk.*
By L. H. PILLSBURY, *D. C.*

IN THE CHANCERY COURT OF SHELBY COUNTY.

The Bill of Complaint of John M. Lea, a citizen of Davidson County, Tennessee, and John Overton, also a citizen of said county and State, Complainants,

vs.

The City of Memphis, a municipal corporation chartered by the laws of

Tennessee, and situated in the County of Shelby, State of Tennessee; the Mayor and General Council and F. C. Schaper, Tax Collector of said city, Defendants.

To the Honorable R. J. Morgan, Chancellor:

Your orators respectfully represent that they are owners of a number of
lots of land in the city of Memphis, the said John M. Lea in right of
97 his wife, Elizabeth B. Lea, who was Elizabeth B. Overton, and your
orator John Overton in his own right and title, and they were the
owners of said lots as aforesaid at the time of the transactions hereinafter related, the legal taxes and assessments upon which they have always paid.

Your orators further represent that by an act passed on the 24th day of November, 1866, amendatory of the charter of the city of Memphis, and especially the fifth section of said act, the General Assembly of the State of Tennessee granted power to said city to provide by ordinance for the grading and paving of the streets, lanes and alleys in said city's corporate limits, and to charge all the costs and expense thereof on the lots and owners of the lots which bordered or abutted on said streets and alleys—said charge when made to become a specific lien upon the lots so bordering on the streets and alleys, and to be for the full cost for the grading and paving said streets or alleys to the middle thereof, and for the length for which
such lot so bordered or abutted thereon.

98 The work of paving to be done under the supervision of the City
Engineer, and the bill for the cost thereof to be certified by him to
be correct.

Especial reference is here made to said amended city charter for a more perfect understanding of the same.

In pursuance of said legislative authority the said city by and through its authorized agents entered into contracts with divers parties to pave certain streets and alleys, and on or about the 11th day of March, 1867, said city so made a contract with certain persons styling themselves Taylor, McBean & Co. for the purpose of paving with what is known as the "Nicholson pavement" the carriage way of the whole or part of Madison, Second, Adams and Union streets, which contract was extended or supplemented by a contract of like character on the 13th day of November, 1867, to pave North Court, South Court and Monroe streets, all of which are streets lying within the corporate limits of said city.

And during the said year of 1867, on or about the 22d day of March,
1867, the said city made and entered into a contract with certain
99 persons styling themselves J. & M. Louden for the purpose of pav-
ing with stone the public wharf or landing, Front street and many of
the alleys and cross alleys of said city running between and parallel with the streets. By each and all of said contracts the said Taylor, McBean & Co. and J. & M. Louden were held and bound to pave said streets with the material and in manner named therein under the supervision and direction of the City Engineer, and in consideration thereof and as payment therefor the said City Engineer was required to make estimates of the cost of said work (when certain sections or parts thereof were completed) in front of each lot or part of lot fronting or abutting on said streets and alleys so being paved, and thereupon to deliver to the contractor the bill for the costs certified to be correct and charged to the owner of each lot or part of lot abutting said streets or alleys, which bills were to be paid in the first instance by the said lot owners, but the city guaranteed to said contractors
that said bills would be paid. Here special reference is made to
100 said contracts for a better understanding of the terms thereof, and

certified copies will be produced at the hearing or before if required by the Court.

Your orators further represent that on or about the 16th day of July, 1867, the said city of Memphis made and entered into a contract with certain persons styling themselves Forrest, Montgomery & Co. for the purpose of paving with "Nicholson pavement" the carriage way of Shelby, DeSoto, Beal, Poplar and Main streets; also within the corporate limits of said city, payment therefor to be made in "paving bonds" of said city; but by subsequent contract and agreement of all parties interested said contract was altered so as to provide for the same manner and conditions of payments as the contract first above mentioned; the same was also transferred to Taylor, McBean & Co., who then styled themselves Taylor, McBean & Baldwin.

And subsequent to these transactions certain persons styling themselves T. E. Brown & Co. by agreement of said city and all other parties to said contracts became the assignees of all of the foregoing contracts for
101 putting down the "Nicholson pavement" in the carriage way of the
streets hereinbefore mentioned, said T. E. Brown & Co. assuming all the duties and obligations of said contracts and receiving all the benefits of said contractors, and being in all things substituted for or subrogated to the rights of said Taylor, McBean & Baldwin, Taylor, McBean & Co. and Forrest, Montgomery & Co.

Your orators further represent that by all the foregoing contracts the city of Memphis agreed to do all the grading and engineering necessary for the preparation of the streets to receive the pavement, both Nicholson and stone, and to bear the expense thereof; for all which cost of measurement and grading the said city caused bills to be made and certified to by the City Engineer and placed in the hands of the City Tax Collector, who collected the same from the owners of lots abutting the streets and alleys paved against whom they were made, and this, too, in the same manner and by the same force and compulsion of duties, warrants and other-
102 wise as were used in the collection of the ordinary revenue of the
city.

Under all the several contracts hereinbefore mentioned the work of paving said streets and alleys was prosecuted vigorously to completion by the contractors of stone and Nicholson pavement, respectively, and as the same progressed estimates were made and bills rendered and certified by the City Engineer placed in the hands of the said contractors for collection, the said city delegating to said contractors and investing them with all power given by the Legislature to enforce payment of the same by suit at law or other compulsory means, and transferring to said contractors the lien created by said legislative enactment upon the lots of your orators and others for the full amount of said bills.

Your orators were thus charged and assessed upon almost every lot they owned in the city of Memphis, and not wishing to have the title to the same clouded with said liens, with the daily threats of having the same foreclosed and their property sold for the payment of said bills, and in order
103 to avoid the annoyance and great expense of defending themselves
against said demand in the Court, more especially as they regarded the said city abundantly able to refund to them any unjust or illegal exactions made of them in the payment of said bills, and knew that the amount paid by them would go to the credit of the city on its account with said contractors for paving, they paid said bills to the contractors whenever the same were presented to them, a receipt given for the amount paid.

In this way, and under these circumstances of compulsion and constraint, your orators paid bills on the lots of land and for the amounts following at the date set opposite each item, to-wit:

Your orator, John Overton, paid the following:

104 FOR NICHOLSON PAVEMENT.

June 4th, 1867, Lot 259 Second street	$743 22
May 25th, 1867, Lot 254 Second street	895 84
June 14th, 1867, Lots 353 & 354 Second street	1,763 82
May 25th, 1867, Lots 347 & 358 Second street	490 02
June 26th, 1867, Lot 246 Second street	882 58
June 3d, 1867, Lot 242 Second street	880 04
July 3d, 1867, Lot 363 Second street	893 95
March 3d, 1868, Lot 10 Second street	621 66
March 3d, 1868, Lot 484 Second street	555 22
March 3d, 1868, Lot 484 Second street	528 02
Nov. 6th, 1867, Lot 107 Main street	523 00
Nov. 11th, 1867, Lots 235 & 236 Main street	2,087 22
Aug. 26th, 1867, Lot 554 N. Court street	345 56
May 28th, 1867, Lot 567 Madison street	856 47
July 31st, 1867, Lot 354 Madison street	1,760 79
Aug. 19th, 1867, Lot 362 Union street	1,680 59
Nov. 2d, 1868, Lot 492 Union street	679 72
June 29th, 1868, Lot 579 DeSoto street	1,484 63
Nov. 28th, 1868, Lot 236 Monroe street	1,469 84
	$19,142 19

FOR STONE PAVEMENT.

June 24th, 1867, Lot 77 Front street	$1,190 22
Aug. 4th, 1867, Lot 82 Front street	387 56
Oct. 4th, 1867, Lot 88 Front street	580 63
105 Aug. 16th, 1867, Lot 77 Front street	434 56
Sept. 9th, 1867, Lot 88 Front street	217 42
Oct. 21st, 1867, Lot 107 Main street	209 32
Nov. 4th, 1867, Lot 259 Second street	282 55
Nov. 22d, 1867, Lots 235 & 236 Second street	888 71
Nov. 11th, 1867, Lot 242 Second street	451 12
Nov. 22d, 1867, Lot 246 Second street	444 75
July 30th, 1867, Lot 76 Front street	533 71
Aug. 19th, 1867, Lot 88 Front street	506 39
Aug. 21st, 1867, Lot 235 Second street	504 26
Aug. 21st, 1867, Lot 246 Second street	536 38
Sept. 7th, 1867, Lot 242 Second street	526 75
	$7,694 33

The aggregate amount of which are $19,142.19 for Nicholson pavement, and $7,694.33 for stone pavement, together being the total sum of $26,836 52, which your orator John Overton paid and settled with the contractors in money or its equivalent, within thirty days from the date of each item, the same being the rendition of the bills, no interest being computed thereon since the date of payment.

And your orator, John M. Lea, paid the following:

106 FOR NICHOLSON PAVEMENT.

Feb. 18th, 1869, Lot 416 Madison street	$1,836 74
Feb. 18th, 1869, Lot 457 Second street	1,774 22
Feb. 18th, 1869, Lot 299 Second street	896 67
Oct. 1st, 1869, Lot 9, Block 64 Second street	567 62
March 3d, 1869, Lot 4, Block 65 Second street	742 73
Feb. 18th, 1869, Lot 239 Main street	626 25
Jan. 29th, 1871, Lot 1, Block 65 Main street	1 166 40
Jan. 28th, 1871, Lot 216 Main street	74 29
Sept. 16th, 1871, Lot 216 Main street	1,288 38
Feb. 17th, 1872, Lot 502 Adams street	1,000 00
Jan. 11th, 1873, Lot 502 Adams street	869 83
March 4th, 1869, Lot 499 Adams street	884 59
Feb. 18th, 1869, Lot 575 DeSoto street	1,482 78
Feb. 18th, 1869, Lot 503 Poplar street	2,295 48
Feb. 18th, 1869, Lot 569 Madison street	1,697 21
Feb. 18th, 1869, Lot 569 DeSoto street	1,247 71
Feb. 18th, 1869, Lot 502 Poplar street	2 020 66
Feb. 18th, 1869, Lot 245 Monroe street	1,751 27
July 5th, 1867, Lot 253 So. Court street	445 71
Oct. 14th, 1867, Lot 581 Union street	1,047 59
March 30th, 1868, Lot 586 Jefferson street	3,068 18
Dec. 21st, 1867, Lot 97 Main street	1,048 78
Amount forward,	$27,803 09

Amount forward	$27,803 09
Nov. 5th, 1867, Lot 499 Adams street	1,000 00
Dec. 18th, 1867, Lot 239 Main street	586 30
Aug. 2d, 1867, Lot 253 Second street	445 71
107 Aug. 2d, 1867, Lot 361 Second street	743 42
Oct. 14th, 1867, Lot 245 Second street	881 13
Dec. 20th, 1867, Lots 109 & 110 Main street	986 23
Dec. 23d, 1867, Lot 216 Main street	100 00
	$32,545 88

FOR STONE PAVEMENT.

Oct. 16th, 1869, Lot 216 Main street	$445 56
Oct. 16th. 1869, Lot 92 Front street	922 57
Oct. 16th, 1869, Lot 239 Main street	537 91
Oct. 16th, 1869, Lot 216 Main street	564 28
Feb. 11th, 1869, Lots 109 & 110 Main street	188 22
Dec. 14th, 1867. Lots 109 & 110 Main street	200 00
Oct. 30th 1867, Lot 85 Front street	411 43
Oct. 2d, 1867, Lot 85 Front street	1,321 37
Oct. 16th, 1867, Lot 82 Front street	1,432 03
Oct. 16th, 1867, Lot 82 Front street	48 84
Feb. 8th, 1868, Lot 245 Monroe street	442 21
Dec. 7th, 1867, Lot 239 Main street	452 87
Sept. 7th, 1867, Lot 85 Front street	531 93
	$6,499 22

FOR GRADING.

Jan. 26th, 1867, Lot 245 Monroe street	$47 44
April 3d, 1868, Lot 9, Block 4 Second street	29 23
April 3d. 1868, Lot 245 Monroe street	20 13
April 3d, 1868, Lot 4 Block 65 Second street	38 97
July 3, 1867, Lot 361 Second street	47 28
June 14th, 1867, Lot 283 Second street	48 02
108 July 30th, 1867, Lot 85 Front street	34 36
Aug. 29th, 1867, Lot 85 Front street	68 30
April 3d, 1868, Lot 239 Main street	20 44
Aug. 14th, 1867, Lot 82 Front street	22 80
April 3d, 1868, Lot 92 Front street	45 72
April 3d, 1868, Lot 499 Adams street	95 94
Aug. 30th, 1867, Lot 581 Union street	121 60
April 3d, 1868, Lots 109 & 110 Main street	18 79
Oct. 21, 1867, Lot 85 Front street	18 73
	$678 22

The aggregate amounts of which are $32,545.88 for Nicholson pavement, $6499.22 for stone pavement and $678.22 for grading, making a sum total of $39,723.35, all of which your orators paid at the date named to the said contractors, their agents or assignees, except the single item of $3068.18 paid March 30, 1868, for Nicholson pavement in front of lot 556 Jefferson street, and the amount paid for grading, which were paid to the City Tax Collector.

As to the said amounts of $3068.18, your orator, John M. Lea, paid the same to the city under the following circumstances, to-wit: Said
109 city undertook to pave in its own way and at its own expense the roadway of Jefferson street and other streets and to reimburse itself levied the special tax upon the abutting property and collected the same through its tax-collector in the same manner as the bills in the hands of contractors were collected; or in other words, the city proposed to pave the streets and collect the cost thereof from the respective property owners. Your orator is informed that the said sum of $3068.18 so paid by him was not paid out by the city on account of paving said street, but was carried into the city treasury and that bonds were issued to pay the entire costs of paving said streets; for the payment of a proportionate share of which and the interest thereon an additional tax has been and will be levied by the city. This being so, the city received said sum from your orators without consideration and upon false representations, which constitutes said city, a trustee holding said sum of money for the use of your orator, Lea, and subject to his reclamations. He has heretofore petitioned the City
110 Council of Memphis, asking that this amount be refunded, but the

committee to which his petition was referred recommended its rejection and it was accordingly refused.

Your orator further represents and shows that many of the citizens and property owners in the city of Memphis refused to pay the bills presented and demanded by the city and the contractors for the costs of paving the streets and alleys bordering their several lots as aforesaid, whereupon a vast number of suits were brought and bills filed in this Honorable Court to enforce the lien of the contractors on the lots of such non-conforming property owners which the aforesaid act of the Legislature and ordinance of Memphis had given them in aid of their said demands. But upon said causes or some of the number being heard, this Honorable Court declined to enforce said liens by a sale of the lots, and pronounced the act and ordinance aforesaid null and void and contrary to the constitution of the State of Tennessee.

An appeal was taken from such decree of this Court to the Su-
111 preme Court of Tennessee and thereupon a hearing was had of the
questions involved in the test case of Abner Taylor et al vs. E. B.
Hart et al.

The honorable Supreme Court affirmed the decree of this Court and decided said acts and evidence conferring powers as aforesaid upon the city of Memphis, through its charter and enabling said city to exercise these powers in the manner hereinbefore described, to be unconstitutional and void.

Thus by far the greater number of lot owners in the city of Memphis who were in all things as much liable to the charges made for said pavement as your orator and many others who paid said charges by refusing escaped the payment of the same, and it at once appears that the amounts paid by your orator were illegally and wrongfully demanded and requested of them under the forms of law.

The decree of the Supreme Court having been rendered against the con-
tractors seeking to recover the cost of the pavement from the owners
112 whose street front had been paved, the contractors turned against
the city of Memphis, and upon its guaranty that the bill should be
paid demanded payment of all bills thus left in their hands and unpaid
from said city, and upon the refusal to pay them much vexed litigation en-
sued between T. E. Brown & Co. and the city in the Court of the United
States, and between J. & M. Louden and said city in the Circuit Court
of Shelby County, the result of all which was that said T. E. Brown & Co.
recovered in the Supreme Court of the United States a judgment for the
sum of $292,133.46, the same being the amount due said T. E. Brown &
Co. under all the aforesaid contracts for Nicholson pavement, after giving
said city credit in the account for all payments made by your orators and
others as aforesaid, all of which appears from the Commissioners' report
filed in said cause, and upon which said decree was founded. Your orators
ask leave to file a certified transcript of so much of said report and decree
as may be necessary or material to their cause as a part of this bill
113 on or before the hearing, and the said J. & M. Louden in like man-
ner and by like reckoning, giving said city credit for all sums paid
to them by your orators on account of paving, recovered a judgment for
the balance due them on said account, being the amount of $32,084.27.

Your orator further shows that the whole or greater part of the said judgments are unpaid, and that the holders of the same are demanding payment of the city, and in aid of the same have procured, one or both of them, writs of mandamus to issue compelling the authorities of said city to levy and collect a tax for the payment of said judgment and cost.

It appears at once upon the recovery of said judgment and the issuance of said writs of mandamus that simple and palpable justice required that your orators and others in like category should receive some reimbursements for the sums paid out by them before they should be required to
114 share also a proportion of the amounts charged against other property owners and by reason of non-payment thus demanded of the city and its citizens at large.

Wherefore the General Assembly of Tennessee passsed a special enactment authorizing and empowering the city of Memphis to levy and collect a special tax for the purpose of reimbursing your orators and others with them the amount paid out by them under the unconstitutional and void act and ordinances hereinbefore set forth.

Said special act was passed March 24th, 1873, and is here referred to, ch. 17, secs. 1 and 2. Said city of Memphis being thus required by mandamus to levy and collect a tax for the payment of the judgments aforesaid and being also authorized by the act of the Legislature aforesaid to levy a tax for the special purpose of reimbursing your orators and others in like category to receive from them in payment for the same the receipt for amounts which they had previously paid to the contractors for said
115 city, endeavored or pretended to endeavor to obey the said writs for mandamus and to carry out the principle of equitation which it was thus authorized to do, and provided by ordinance that the Mayor should "issue to each and every person or corporation holding the receipt of the "contractors or of the city for payment actually made upon bills or ac-"counts certified to be correct by the City Engineer for or on account of "the paving of the streets and alleys of the city with the Nicholson or "stone pavement under the provisions of the city charter and the ordi-"nance of the city charging the costs of such payment upon the prop-"erty in front of which the pavement was laid down, which provisions "of the charter and ordinances have been held by the Supreme Court of "Tennessee to be unconstitutional and void,

"A certificate of indebtedness under seal of the city and countersigned "by the Register for the amount of money actually paid upon such re-"ceipt, with interest thereon at the rate of six per centum per annum "from the date of payment until the time the said certificate may
116 "be redeemed by the city."

And by a subsequent section of said ordinance it was provided "that the certificates of indebtedneass to be issued under this ordinance "shall be received at their face value and interest in payment of any "tax that may hereafter be levied by the city of Memphis to cover the "entire cost of laying the Nicholson and stone pavement," etc.

And very shortly thereafter said city by ordinance levied a tax of 70 cents on every $100 real estate and other taxables for the purpose of paying the judgment of T. E. Brown & Co., which, by the terms of the ordinance, could be paid only in money, and was termed "Mandamus Tax," and about the same time levied a further tax of 70 cents on every $100 worth of real estate and other taxables for the purpose of reimbursing, as it was called, which last tax could be paid in the certificate of indebtedness above described, said taxes amounting to $1.40 on every $100 of taxable property, was levied upon the assessments for the year 1873.

117 Afterwards, to-wit: on the —— day of ——, 1874, said city levied a further tax of 70 cents on every $100 of taxable property assessed for the year 1874, which tax was also for the purpose of paying off the

judgment of T. E. Brown & Co., and by ordinance could be paid only in money.

By reason of the tax levied aforesaid your orator John M. Lea is charged and his property encumbered with an additional amonnt of $6014.40 for 1873 and $2628.15 for the year 1874, payable only in money, by the ordinance aforesaid, and $6014.46 payable in the certificates of indebtedness aforesaid, making a total additional taxation on your orator Lea of $14,656.95 already levied. In like manner your orator John Overton is charged and his property encumbered with a tax of $6811.35 for 1873 and $2904.45 for 1874, payable only in money, and $6811.35 payable in certificates of indebtedness, making a total additional taxation on your orator Overton
of $16,527.15 already levied, and this, too, after your orators have
118 paid more than the proportion of the cost of said pavement which
would be charged to them upon a proper distribution of the whole burden by general taxation.

But said city is about to go further and levy an additional mandamus tax for the year 1875 upon all the taxable property within its limits, your orator's as well as others, and unless restrained by this honorable Court will further charge your orator's property for the year 1875 and all years to come, until the whole of the amount due the contractors as aforesaid is paid. Since the year 1873, however, the said city has levied no tax for reimbursement, and your orator is informed that no further reimbursing tax or tax to cover the entire cost of the pavement will be levied by the city; indeed, the act of Legislature authorizing the levy of said tax to cover the entire cost of the pavement passed March 24th, 1873, was repealed by the act of 1875
passed March 20, 1875, for the regulation of municipal corporations
119 and being chapter 92, sec. 81 of said act. So that said city is no
longer authorized to levy a reimbursing tax, except as it may be required to do so by the courts, notwithstanding said repealing statute.

Your orator, John M. Lea, not at all believing in the good faith of said city in its attempted but deceptive plan of equalization nor that said city would ever redeem from him the certificates of indebtedness voluntarily by the levy of a tax to cover the entire cost of paving, but believing that the evidences of the just indebtedness of the city to himself would be better preserved by an acknowledgment of said indebtedness made by itself than by receipts of contractors which he held, delivered up to said city the bill receipted by the contractors and took from said city the certificate above described as one acknowledgment of its indebtedness to your orator, and he now holds the same in lieu of the original receipts taken upon payment
of the money to the contractors. Your orator, John Overton, has
120 not surrendered the original bills receipted by the contractors, but
holds the same as they were first taken by him. But both your orators have tendered to the City Tax Collector an amount of said certificates of indebtedness equal to the whole amount of said mandamus and reimbursing taxes assessed against them, the necessity of said Overton converting his receipts into certificates being waived by said tax-collector, and the same was refused, except as to the reimbursing tax, which could by ordinance be paid in said certificates; and your orators here tender into court for the payment of the whole amount of paving tax levied upon them—both mandamuses and reimbursing—an amount of said certificates of indebtedness sufficient to pay the same. Your orators retain their said receipt and certificates for safe keeping, but file one of each alike in form to all the rest as exhibits Nos. 1 and 2 to this bill, but the same need not be copied.

Your orators do not deny the justice of the judgment against the city and in favor of T. E. Brown & Co. and J. and M. Louden 121 and the suits of mandamus given them to enforce the same. On the contrary your orators admit that it is right and proper that the contractors should have a mandamus to collect the balance due to them, but your orators allege that they have already paid large sums of money on this account with the consent and at the request of the city, and that no further demand on this paving account can be made on them or their property until the magnitude of levies resting on the property exceeds the sum they have paid aforesaid. Nor, in an equitable point of view, could said contractors complain of the amenity of your orators from further taxation because they have paid to them and hold their receipt for the amounts paid, and in the litigation with said contractors with the city, if they intend to have any further claim upon your orators or their property, they should have assigned to your orators so much of their whole claim against the city as had been paid to them by your orators instead of giving credit to the 122 city for said amount, as was done.

All the foregoing matters alleged and stated by your orators as between the said contractors and the city of Memphis are so alleged and stated upon information, and as matters of public report and notoriety, the same abundantly appearing by an inspection of the various contracts, ordinances, Court records and writings concerning the said transactions. Your orators have not here exhibited the same on account of the voluminous nature of them, but they ask leave to file all or any part of them as the same may become material in the progress of the cause and to make them exhibits to and a part of the bill without formal amendment or motion.

Finally, your orators allege that F. C. Schaper, City Tax Collector, is demanding of your orators payment of the aforesaid mandamus and reimbursing tax except the sum of $210.00 mandamus tax and $572.92 reimbursing tax, which sums are credited to Jno. M. Lea on the tax books 123 as having been paid by tenants occupying the lands of said Lea, and is daily threatening to issue distress warrants against your orators and seize upon their personal property for the payment of said taxes, and should he fail in that, to advertise and sell the lots and lands of your orators for the full satisfaction of the same. All this your orators believe the said Schaper will do unless restrained by this Honoroble Court. And your orators are informed that the city of Memphis is about to levy other and additional taxes upon your orators' property for paying judgment upon which in time distress warrants will also issue and their lands be again exposed to sale, thus annoying and harrassing your orators wrongfully and unjustly and almost to an entire depreciation of the enjoyment of any of their said property. All of which will surely come upon your orators unless they are aided by the power of this Honorable Court to restrain and prevent the same.

Your orators further allege that the city of Memphis has no 124 property on which an execution at law could be levied and no debts due to it which could be seized by process of garnishment, and that your orators have therefore no remedy at law by which they could collect the sum of money due them as hereinbefore set forth.

Moreover the power to levy a tax for the reimbursement of your orators and others standing in the same position has been repealed by the Legislature and the power of taxation so restricted as to make it impossible for the city authorities acting within the limits of the present charter to levy taxes for the reimbursement and liquidation of said indebtedness.

Your orators do not admit the validity of such legislation, but as the city has already ceased to levy tax they do not doubt that the city will avail itself of the said legislation to avoid the levy of the proper tax, and so your orators charge that they are wholly without any convenient or adequate remedy for the collection of their debts and can only have affective relief by resort to this Court for the purpose of having their said
125 several claims set off by the decree of this Court against the taxes now assessed against your orators respectively as hereinbefore shown and against such other taxes of like nature as may be assessed against your orators respectively before the final decree in this cause. Nor can said contractors for whom said taxes are or will be levied on other citizens and property holders of Memphis complain or object to the exemption of the property of your orators from said tax until the amount of the tax exceeds the amount heretofore paid by them, for the reason that the debt for said pavement was a debt originally against the city of Memphis and its citizens in favor of T. E. Brown & Co. and J. & M. Louden as aforesaid, and the amount paid by your orators was a reduction of the said indebtedness and in this a benefit to the city of Memphis and other citizens and property owners to the amount of said payment, and was a satisfaction protanto to said contracts and a payment as all they could rightfully demand of your orators. Wherefore your orators allege that said contracts or the
126 said city should not claim further payment of your orators until all others have paid the paving tax to an amount bearing the same proportions to the property of each as the amount paid by your orators bear to their own property.

Upon all the foregoing facts and circumstances your orators are advised, believe and therefore charge that the payments made by them as aforesaid were illegal and unjustly demanded of them by the said city and its agents; that the charges made against them in said paving bills were in no sense of the word a tax, and though said payments were made through a mistake of the city's right to compel the same they may be recovered from said city in any Court having cognizance of the subject matter and the parties; that the law under which the said payments were enacted was a private enactment and not a public law of the land, of which all men should take notice; that the same were made under and with the inevitable danger of having multitudinous writs brought against your orators, their lots
127 seized under pretended lien and public sale made thereof for the satisfaction of said paving bills; that said duress and compulsion and said illegal exactions were made by the said city of Memphis, and for this it is liable to your orators for the full amount of said payment with interest thereon from the day said payments were made.

Again your orators are advised and charge that the payments made by them to the contractors were made upon the request of the city of Memphis, and on account of a debt due from said city to said contractors; that the sums so paid were credited to the city suits, settlements with said contractors, and were deducted from the total indebtedness of the city to them before any judgments final was rendered against said city; that the indebtedness for which said payments were made was in no sense a debt due from your orators to the contractors and they owed said contractors nothing. All of which reasons your orators are advised raise an assumpsit and implied
128 promise to pay your orators, which the Court will enforce by decree against said city and in your orators' favor for the full amount of said sums so paid, and interest from the days of payment.

And your orators further charge that not only is the said city bound by implication at law to pay the same so due to them, but also by repeated acknowledgements and express promises to pay made by said city, made from time to time, and especially on 25th day of June, 1873, when it passed the ordinance hereinbefore set forth acknowledging in terms the justice of your orators' claim, and providing for the issuance of certificates of indebtedness as aforesaid.

The issuance of said certificates and the passage of said ordinance being the beginning of an attempt on the part of said city to pay off and cancel the indebtedness of your orators. But your orators charge that the said proposed reimbursement has never been accomplished, nor can it be until a tax is levied to pay off the entire cost of said paving, and your ora-
129 tors' claims receive in payment of their proper share of such tax, as
far as the said indebtedness will go in payment of the same until the receipt and certificates of your orators are received as far as they will go in payment of all paving tax, under whatever name, before your orators can be called upon to pay said tax, or any part thereof, in cash as the same is now levied.

As illustrating the illusory attempt aforesaid by the mandamus levy of 1873, your orator, John M. Lea, would be forced to pay $6,014.46 in addition to the amount of $3,973 35-100 already paid by him to the contractors, and now represented by certificates as aforesaid, and by the reimbursing levy of 1873 he would be required to pay in such certificates or surrender the same to the city for a like amount, $6,014.40, making a total tax upon him for that year of $12,028.80, one-half in cash and one-half in scrip; and even if the plan had been carried out till the whole of the cost of
130 the paving was paid, it would have ended with your orator, Lea, having
the same cause of complaint against the city, simply turning over his indebtedness from certificates to a claim against the city for the amount paid to it, and adding interest thereon from the time said payments were made.

But your orators charge that after the year 1873 the city levied no reimbursing tax, and that it will levy no other, nor will it make any other or further effort to repay to them the amount paid by them as aforesaid unless compelled by this honorable Court either to pay the amount of the claim of your orators by a special tax for the purpose, or to receive from them the evidence of their former payment in lieu of money for any paving tax now levied or to be levied for the cost of the Nicholson and stone pavements aforesaid until the amount of your orators' share of said taxes amounts to the sum heretofore paid by them, or in other words, make the whole amount of their receipts and certificates is consumed in the payment of said
131 tax.

Your orator, John M. Lea, charges that the amount of $3,068 18-100 paid by him for paving on Jefferson street, was paid to said city with its promise and express purpose of paying a part of the cost of paving said Jefferson street, which it wholly failed to do, said city instead of paying out said sum for said pavement converted the same to its other uses, and issued its bonds or obligations instead, which bonds your orators will be called upon to pay his share of and the interest thereon, which is an annual charge upon the property of your orator, Lea.

And in the same way, your orators charge they will be required to pay again their rateable share of the sums paid by them to said city for grading and engineering, and they are now annually charged with interest on the bonds or obligations of said city, given for the payment of said grading and engineering expenses when your orators have already paid as aforesaid the

amounts charged upon their property in the former levies for the
132 purpose.

Your orators charge that the taxation mentioned is for the purpose of paying a judgment against the city for an indebtedness, a large part of which your orators, at the request of said city, have paid; that the payment so made by them enured to the great benefit of the city, and the benefit of all other property owners who have made no payment to said contractors holding such judgments; that now the mandamus taxes, the reimbursing tax, and all other taxes for the paving debt are levied and charged upon your orators and their real estate until the whole of said indebted-
133 ness is paid off, or until restrained by this Honorable Court.

This your orators charge is a gross inequality in the collection of the cost of said pavement, a great injustice to them, and an outrage upon every constitutional principle of taxation, and so would be the collection of any tax from your orators until what they have already paid is refunded to them, or until a tax is levied in such proportion that your orators will receive ample remuneration for what they have paid. In which event your orators will be, as they ever are, willing and ready to pay the tax charged upon them as their rateable share. To which end they made the tender of the evidence of indebtedness as aforesaid in payment of all taxes now levied and now tender in Court said certificates and receipts to pay said taxes and any future taxes levied for the same purpose until the whole of their said claims are used in this way. But your orators charge that the remainder, if any, after paying all of such paving taxes, is a proper charge against the city of Memphis, for which they are entitled to a decree for money
134 to be paid to them under proper orders of this Court.

Upon consideration of the premises, your orators pray that the said city of Memphis and its tax collector, F. C. Schaper, be made parties to this bill by proper process; that they may be made to answer its allegations as fully as if specially interrogated thereto; that they exhibit with their said answers, or from time to time, as the same may be required, and discover all the ordinances, contracts, agreements, resolutions, &c. named in this bill and bearing upon the matters alleged; that the defendant specially answer whether or not it has not in the possession of its officers the receipted bill for payment made to the contractors, T. E. Brown & Co., or their predecessors, and to J. & M. Louden to said city by Jno. M. Lea, amounting to $39,723.35, whether or not it did receive credit for said aggregate amount in the settlement of accounts between it and T. E. Brown & Co. and J. & M. Louden, deducting the sums paid for grading and paving Jefferson street; whether or not it received credit in said settlements
135 with Brown & Louden for the amount of $26,836.52 paid by Jno.
Overton to them; whether or not the sum of $3,068.18 was not paid to it by Jno. M. Lea for the paving of Jefferson street, and whether or not the cost of paving said street was paid in cash or in bonds, or in other obligations of the city now running to maturity and bearing interest; whether the items of grading or engineering herein set forth were not paid to the city by complainants, Lea & Overton; whether or not the said cost of grading was paid in money or in bonds, or other obligations of the city, now running to maturity and bearing interest, and that said city in all respects answer particularly the complainant's bill.

Your orators also pray that a writ of injunction issue restraining the city of Memphis and its Tax Collector or other officers or agents from further attempting to collect or compel payment from your complainants the account for paving taxes, both mandamus and reimbursing, or by any other

name for that purpose, which are now levied and which may be hereafter levied before a final decree in this cause, except in accordance with the tender made by complainants in the receipts or certificates as aforesaid;
that said city be commanded to receive from complainants in pay-
136 ment of all the taxes aforesaid the evidences of indebtedness for
payment heretofore named by them; that they refrain from issuing or causing any distress warrants or other procees for the collection of such taxes from the complainants, or from advertising or condemning or selling the lands of complainants for the payment of any such taxes, and from in any manner increasing costs and penalties as to the same, and from executing or attempting to execute any warrant or process already issued; that upon the hearing of the cause decrees may be rendered in favor of complainants and against the defendant city of Memphis for the full amount of the sums paid by them with interest thereon from the days of payment, but to be redeemed and satisfied protanto by amounts of taxes levied for paving as aforesaid and paid under orders of this Court as complainants admit to be an equitable adjustment; that if necessary an account be taken to ascertain the true indebtedness of the defendant, and that upon the rendition of the final judgment, the certificates or receipts aforesaid be delivered to said city and cancelled.

If your orators mistake in the relief asked they pray for all other proper general and special relief which the nature of their cause entitles them to,
and that all proper orders and decrees be made as from time to time
137 may be necessary or expedient to attain the ends of perfect justice,
and complainants will ever pray, etc.

ESTES & ELLET,
WM. W. GOODWIN,
Sols. for Complainants.

STATE OF TENNESSEE, }
SHELBY COUNTY. }

Personally appeared before me, E. A. Cole, C. & M., John Overton, Jr., and Wm. W. Goodwin, agents for John Overton and John M. Lea respectively, who make oath that the matter stated in this bill of complaint is true to the best of their knowledge, information and belief.

JOHN OVERTON, JR.,
WM. W. GOODWIN.

Subscribed and sworn to before me December 24th, 1875.

E. B. McHENRY, *D. C. & M.*

Subscribed and sworn to by W. W. Goodwin January 19th, 1876.

E. B. McHENRY, *D. C. & M.*

138 MOTION TO STRIKE OUT, ETC.

Filed Feb'y 10, 1875. H. E. ANDREWS, *Clerk.*

In the Circuit Court of the United States, for the District of West Tennessee:

T. E. BROWN
vs.
THE CITY OF MEMPHIS AND OTHERS.

The plaintiff moves to strike out the pretended return of the city of Memphis to the peremptory writ of mandamus herein issued, because—

1. The requirement of the said writ to have the money in Court here to pay it to the plaintiff on or before the fourth Monday of November, 1875, the return day of the writ, was absolute and cannot be satisfied or excused by anything alleged in the said pretended return.
2. The fact that the Legislature changed the assessment law was no ex-

cuse for failing to levy and collect the tax and pay over the money
139 as required by the writ. It was not necessary for the city to wait
for the new assessment of the State and county for 1875. If it could not make its own assessment for the purpose of levying and collecting the tax it was commanded to levy by the said writ, which the plaintiff insists it could have done, it should have adopted for the purpose of said levy the State and county assessment for the year 1874.

3. The plaintiff's rights were beyond the control and could not be affected by the act of the Legislature of the State of Tennessee, nor by anything that has resulted from the said act.

And admitting that the matters of the said return may excuse the failure of the defendants to collect and pay over the sum they were commanded to collect and pay over by the said writ as therein required, the
140 plaintiff says that the said return does not show that the defendants
have done and are doing all that they lawfully could do to comply with the requirement of the said writ, because--

1. It appears by the ordinance purporting to levy the tax exhibited with the return, that only a portion of the taxable property of the city has been assessed for taxation, and that the capital of the merchants, which is a large part of the said taxable property, is altogether omitted from the levy.

2. The return does not show what progress has been made or is being made in the collection of the said tax, nor show the length of time that will be required to collect the amount that the plaintiff is entitled to have under the said writ.

For the said reasons and others apparent, the plaintiff demurs to the said return.

141 And as to the questions submitted by the defendants in the return the plaintiff submits—

First, That the property situated in the 9th and 10th wards of the city must be taxed alike and equally with other property in the city, because—

1. The act of December, 1869, has been repealed, and there is no law exempting the said property from taxation.

2. The exemption in the act of 1869 was obligatory only upon the city and could be regarded only in distributing the taxes collected and was not a rule for taxation.

3. The constitution prevents any such exemption or discrimination as that set up in behalf of the property in the 9th and 10th wards.

4. The debt of the plaintiff for which the writ commanded the levy of the tax was not created before December, 1867, but after that time, as appears by the return, and was created before December, 1869.

142 Second, The parties who paid the assessments made upon their
property by the front foot for the purpose of paying for the laying of the Nicholson and stone pavements are not entitled to pay the taxes levied upon their property in pursuance of the said writ of mandamus with certificates or receipts for such payments, nor is their property entitled to exemption from the said taxation, because—

1. The sums the said parties so paid were not taxes, but were paid voluntarily without authority of law or legal compulsion, and affords no exemption from lawful taxation, and if the parties making the said payments have any rights whatever growing out of the facts they are against the city of Memphis for so much money paid to its use.

143 2. All taxation must be equal and uniform and all property must
be taxed; and the property of the said parties who paid the said

taxes cannot have an exemption from the taxes levied under the said writ of mandamus.

3. The taxes levied under the said writ of mandamus are to be devoted exclusively to the payment of the judgment of the plaintiff, and must be collected in lawful money, as the plaintiff cannot be compelled to accept anything else. Nor could the city, after accepting a debt or the evidence of a debt due from it in payment of the said taxes or a portion of them, pay the same to the plaintiff.

4. If the parties who have paid the said assessments have any rights or remedy it is, as the plaintiff insists, to have a tax levied for their especial benefit, on a tax large enough to pay the entire cost of all the pavement, including that already paid for by the property owners, and that 144 represented in the judgment in favor of the plaintiff, either of which modes will enable them to collect what is due them without interfering with the plaintiff's rights.

The act of 24th of March, 1873, has been repealed, and there is now no law compelling or allowing the city to accept the payments made by the property owners for the Nicholson or stone pavement in satisfaction of taxes levied, nor is there any law allowing the levy of a tax for reimbursing the said parties what they have paid.

RANDOLPH, HAMMOND & JORDAN,
For Plaintiff.

Filed March 26, 1875.

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

145 AFFIDAVIT AND MOTION.

In the Circuit Court of the United States, District of West Tennessee:

T. E. BROWN
vs.
THE CITY OF MEMPHIS AND OTHERS.

I, Talmadge E. Brown, plaintiff in the above proceeding, do swear that I am informed and believe that the tax levied by the city of Memphis for the year 1875, in pursuance of the peremptory writ of mandamus from this Court returnable on the 4th Monday of November, 1875, is wholly insufficient to pay the sum of one hundred and twenty-five thousand dollars on the judgment in my favor against the city of Memphis as contemplated by the said writ.

The rate of taxation, as I am informed and believe, for the purpose of raising the said sum has been fixed at 54 cents on the hundred 146 dollars of taxable property.

And the said rate, as I am informed and believe, is being collected only on the taxable real and personal property of the city, excluding the taxable capital of merchants, which is assessed or listed for taxation separately from the other taxable property of the city. The amount of the capital of merchants so assessed for taxation for the year 1875 is about the sum of $6,000,000, as I am informed and believe.

All the rest of the taxable property of the city assessed for taxation, as I am further informed and believe, after allowing the deduction for errors and over valuations that heretofore have been made, amounts to about the sum of $23,000,000.

Included in the said amount of taxable property is the property in the 9th and 10th wards of the city of Memphis, which were added to 147 the city by the act of the Legislature of the State of Tennessee of December, 1867, to which reference is here made.

The property in the 9th and 10th wards as assessed for taxation amounts to the sum of about $2,000,000.00.

It is claimed and has been decided by the Chancellor of the Chancery Court of Shelby County, and is the opinion, as I am informed and believe, of the Judge presiding in this Court, that the property in the 9th and 10th wards is exempt from taxation for the payment of the judgment in my favor against the city of Memphis, by reason of the following state of facts:

The act of the Legislature of the State of Tennessee of the 1st of Dec. 1869, reducing into one the various acts having reference to the city of
Memphis, provided, amongst other things, that the people residing
148 within the said wards should not be taxed to pay any part of the
debt of the city, or interest thereon, contracted prior to the passage of the act of 1867.

The said act was expressly repealed by Section 81 of Chapter 92 of the acts of 1875, passed and approved 23d of March, 1875; but Section 68 of said act provided that any provision in the charter of such cities as exempts the people residing in any new territory from paying part of the debt of such city, contracted previous to the incorporation of such new territory, shall remain in full force, and shall not be repealed or affected by this act.

The judgment in my favor against the city of Memphis was rendered for a balance due me by the city for Nicholson pavement laid down for the city,
under contracts entered into by the city, before December, 1867.
149 The pavement was in fact laid down after December, 1867, and
before December, 1869—at least this is true of the greater part—though another part may have been, and possibly was, laid down before December, 1867.

The suit in which the judgment was rendered was brought in this Court in the year 1869; the judgment or decree first pronounced in this Court was in the year 1872, and the final decree entered in accordance with the mandate of the Supreme Court of the United States, was pronounced in the year 1875, all as more fully appears by the records.

Included in the said amount of taxable property so listed and assessed for the payment of the judgment is a large amount of property supposed to
be of the assessed value of about $7,000,000.00, which is claimed
150 to be exempt from taxation for the payment of my judgment upon
the following state of facts:

The judgment against the city is for a balance due me for Nicholson pavement laid down in the streets of the city of Memphis.

The pavement was laid down under contracts which the city made by virtue of ordinances, passed under the provisions of Section 4 of the act of the 24th of November, 1866, entitled: "An act to amend the charter of the city of Memphis, and for other purposes," by which the costs of the pavement was required to be borne by the owners of the adjoining property, and was to be apportioned and charged in the adjoining lots in proportion to their front on the street, lane or alley paved, and was to be paid by the owners respectively in the said proportions, and was to be a lien on the lots
respectively, under the said contracts. The City Engineer made
151 out the accounts of the property owners or lots respectively for the
portions of the costs of the said pavement that they respectively were chargeable with. And the same were to be paid by them like liabilities contracted by themselves.

The city, by a special contract, guaranteed the payment by the property owners respectively of the portions of the cost of the pavement so apportioned to them.

And it was by virtue and in consequence of the said guaranty that I recovered the judgment or decree aforesaid against the city.

Many of the property owners against whom the said accounts were so made out paid the same, and the money so paid was received and was credited on the amount due from laying down the said pavement under the said contract, or else was received and has been retained by the city itself.

152 Others of the said property owners refused to pay the sums apportioned to them and suits were instituted to test their liability therefor, and in such suits it was finally decided by the Supreme Court of Tennessee that the said act of the Legislature and the ordinances passed in pursuance of it and the contracts so far as they attempted to charge the cost of the said pavement on the abutting lots, were void, being in conflict with the constitution of the State, and that the said property owners were not liable for the said sums.

After the decision the Legislature of the State passed the act of 24th of March, 1873—Acts of 1873, chapter 67, page 102—for the purpose of enabling the city to refund to those who had paid their proportions of the costs of the said pavement the sums they had paid. In pursuance of the said act the city of Memphis, as I am informed, and believe, has issued to the parties making the said payments certificates of indebt-153 edness for the amounts paid, to be discharged by the levy of a special tax under the act of 1873, and nearly all the parties making the said payments, as I am informed and believe, have accepted the said certificates, and those not paid by the city or taken up are yet outstanding. The said act of March, 1873, has been repealed by section 81 chapter 92 of the act of 1875.

And I am informed and believe that the Chancellor of the Chancery Court or Shelby County has decided, and that it is the opinion of the Judge now presiding in this Court, that the said property on which the said special assessments were so paid is not now liable to taxation for the payment of the judgment in my favor.

I am advised that the capital of merchants is legally taxable for the payment of my said judgment, and that the same tax should be levied and collected thereon for the payment of the judgment as on other taxable property; and that the city of Memphis and its Mayor and General Council should be compelled by an alias writ of mandamus to include the 154 capital of merchants in the taxable property for the payment of the said judgment, and to collect the tax thereon and pay the same over to me as commanded by the original writ herein.

And I am further informed and believe that heretofore only about sixty (60) per cent. of the taxes levied in the city of Memphis have been collected; that after the withdrawal of the property in the 9th and 10th wards of the city as exempt from taxation as aforesaid, and the exemption for the like reason of the property on which the special assessments to pay the costs of the pavement laid down in front of it were paid as aforesaid, the entire residue of the property taxed to pay ths judgment (not including merchants capital) is about $14,000,000, and that the money to be realized therefrom can scarcely exceed $45,000. And so, instead of realizing $125,000 on the said judgment to which I am entitled by the final judgment of this Court, I will not receive in all probability out of the levies for the year 1875 as they now stand, much more than one-third that sum.'

155 'In consideration of the premises I pray that I may have in addition to the writ commanding the levy and collection of the tax on

the capital of merchants a further or alias writ of mandamus commanding the city of Memphis and its Mayor and General Council to make a further or additional levy of taxes on all the taxable property of the city of Memphis, including the capital of merchants as taxable, and excluding the property in the 9th and 10th wards of the city, and the property aforesaid on which the said special assessments for the Nicholson pavement costs were so paid as exempt from such taxation, such an amount in addition to the levy already made as will be sufficient to pay to me the entire sum of $125,000 to which I am entitled as aforesaid; and that the said levy may be made upon the taxable property as assessed and returned for the year 1875, and may not be further postponed.

T. E. BROWN.

156 Subscribed and sworn to before me this 1st of March, 1876.

L. H. PILLSBURY,
U. S. Circuit Court Commissioner for Western District of Tennessee.

ORDER ENTERED MARCH 2d, 1876.

T. E. BROWN
vs.
THE CITY OF MEMPHIS ET AL. } Law Docket 1874½

In this cause the Court having on a former day of the term taken under advisement the motion of the plaintiff to strike out the paper filed as a return to the peremptory writ of mandamus herein issued returnable on the 4th Monday of November last, and it appearing to the Court that the said return is uncertain, indefinite and insufficient in its statement of the several acts that have been done in obedience to and for the purpose of complying with the requirements of the said writ, it is ordered that the said motion be sustained, and that the said paper so purporting to be a return to the said writ be stricken out and held for naught, and that the plaintiff recover of the defendants all his costs herein expended for which execution may issue.

The defendant has leave to amend his return or make further return herein on or before the 12th day of April next.

H. B. BROWN, *U. S. Dist. Judge.*

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ORDER ENTERED MARCH 2, 1876.

TALMADGE E. BROWN,
vs.
THE CITY OF MEMPHIS ET AL. } Law Docket 1874½.

The parties appear by their respective attorneys and this cause is heard on the affidavit of the plaintiff on file, and on his motion that the court issue an alias writ of peremptory mandamus directed to the City of Memphis and its Mayor and General Council, commanding them to levy, in addition to the tax already levied, a further tax on all the taxable property of the city, excluding from such taxable property the property of persons residing in the 9th and 10th wards of the city, as exempt from taxation, for the payment of the judgment of the plaintiff, and the other property in the city on which assessments have heretofore been made by the front foot for the payment of the costs of laying the Nicholson pavement, and which assessments have been paid by the owners of such property as also exempt from taxation, for the payment of said judgment sufficient in amount, when added to the tax heretofore levied under the original writ herein issued, to enable the plaintiff to realize the sum of one hundred and twenty-five thousand dollars, which the said original writ required to be levied, collected and paid to him. And it appearing to the

158

Court that the facts stated in the said affidavit are substantially true, and that by reason of the said facts the said property in the ninth and tenth wards and the said property on which the said special assessments for the payment of the costs of the Nicholson pavement have been so laid and paid is not subject to taxation for the payment of the said judgment, and that the same ought to be exempt from such taxation, and that where the said property is so excluded from taxation, the residue of the property liable to taxation for the payment of the said judgment taxed as the rates heretofore fixed for the purpose by the city, will not yield an amount sufficient to enable the plaintiff to realize the sum of one hundred and twenty-five thousand dollars, to which he is entitled, as appears by the said original writ.

It is therefore ordered that the motion of the plaintiff be sustained, and that an alias peremptory writ of mandamus do forthwith issue, directed to the City of Memphis, and its Mayor and General Council, commanding them to proceed, when they next levy taxes, to levy in addition to the taxes already levied for the payment of the plaintiff's judgment under the requirements of the original writ herein issued, a further tax on all the taxable property of the city, excluding from such taxable property the property of persons residing in the ninth and tenth wards of this city, and the property on which the assessments for the payment of the costs of laying the Nicholson pavement have been paid, the same being, as the Court adjudges, exempt from taxation for the payment of the said judgment, sufficient in amount, when added to the tax heretofore levied under the original writ, to yield to the plaintiff one hundred and twenty-five thousand dollars, and to collect the said taxes so to be levied as speedily as the same can be lawfully done, and to pay over to the plaintiff forthwith, from time to time, as the same may be received, the sums collected, taking his receipt therefor, and that they make due return to the Court herein on the return day of the writ of the manner in which they have obeyed the same.

H. B. BROWN,
United States District Judge.

ORDER OF MARCH 2nd, 1876.

TALMADGE E. BROWN
vs.
THE CITY OF MEMPHIS ET AL.

The parties appear by their attorneys and this cause was this day heard on the affidavit on file, and the motion of the plaintiff that a peremptory writ of mandamus issue requiring the City of Memphis and its Mayor and General Council to include in the taxable property of the city on which the tax for the payment of the judgment in favor of the plaintiff has, under the peremptory writ of mandamus, heretofore 160 issued herein, been levied, the taxable capital of merchants for the year 1875, as heretofore returned and assessed by the city for taxation and for other purposes, and to lay the same rate of taxation thereon for the payment of the said judgment as on the other taxable property of the city. And to collect the said taxes so to be laid, and to pay the same over to the plaintiff forthwith, from time to time as collected, according to the command of the original writ herein.

And it appearing to the Court that the taxable capital of merchants for the year 1875 has not been included amongst the taxable property

of the city on which the said tax for the payment of the said judgment is being collected, and that such omission is improper, and that the capital of merchants ought by law to be taxed the same as the other taxable property of the city for the purpose of paying the said judgment.

It is therefore ordered that the motion of the plaintiff be sustained, and that a peremptory writ of mandamus do issue, returnable to 161 the next term of the Court, commanding and requiring the City of Memphis and its Mayor and General Council to proceed forthwith to include within the property to be taxed for the payment of the judgment of the plaintiff, in accordance with the peremptory writ of mandamus heretofore issued herein, the taxable capital of merchants for the year 1875, as heretofore returned and assessed by the city for taxation for other purposes. And to lay the same rate of taxation thereon for the payment of the judgment of the plaintiff that has been levied on the other taxable property of the city, and to collect the said taxes so to be laid and to pay the same over to the plaintiffs forthwith as collected, according to the command of the said original writ. And that they make known at the return day of the writ how they have obeyed the same.

H. B. BROWN, ***U. S. D. Judge.***

167 CIRCUIT COURT OF THE UNITED STATES,

(WESTERN DISTRICT OF TENNESSEE.)

TALMADGE E. BROWN
vs.
THE CITY OF MEMPHIS.

The United States of America to John R. Flippin, Mayor, W. A. McCoy, James Eleler, John Zent, S. W. Green, H. G. Dent, W. O. Harvey, W. N. Brown, J. W. Cochran, L. D. Grant, and Thomas Flemming, Aldermen, P. J. Kelly, Jno. W. Kerns, John Donovan, Jno. M. Roake, Thomas Boyle, James Speed, J. T. Blaise, H. M. Neely, Richard Doherty, E. Harden, Jacob Weller, A. W. Olis, W. H. Bates, R. C. Williamson, R. D. Denson, H. Leesel, E. J. Karr, W. B. Glisson, H. M. Hill, and George Hutchinson, Councilmen, constituting the General Council of the City of Memphis, Tennessee—Greeting:

Whereas, Talmadge E. Brown obtained an order in the Circuit Court of the United States for the Western District of Tennessee on, to wit, the 30th day of March, 1875, commanding the City of Memphis, 168 by its Mayor and General Council, to proceed to lay and collect a tax on all the taxable property in the City of Memphis sufficient in amount, after allowing for delinquencies, insolvencies, and default, to pay to T. E. Brown the sum of one hundred and twenty-five thousand dollars, and to pay the same when collected over to said T. E. Brown, and make their return to the writ issued under said order to the Court here on the 4th Monday in November, 1875. And whereas in said Circuit Court on, to wit, the 2d day of March, A. D. 1876, the following order was made and entered of record in this cause, viz:

The parties appeared by their attys., and this cause was this day heard on the affidavit on file and the motion of the plaintiff that a peremptory writ of mandamus issue requiring the City of Memphis, and its Mayor and General Council, to include in its taxable property of the city, 169 on which the tax for the payment of the judgm't in favor of the plaintiff has, under the peremptory writ of mandamus heretofore

issued herein, been levied, the taxable capital of merchants for the year 1875, as heretofore returned and assessed by the city for taxation for other purposes, and to lay the same rate of taxation thereon for the payment of the said judgment as on the other taxable property of the city, and to collect the said taxes to be laid, and to pay the same over to the plaintiff forthwith, from time to time as collected, according to the command of the original writ; and it appearing to the court that taxable capital of merchants for the year 1875 has not been included amongst the taxable property of the city on which the said tax for the payment of the said judgment is being collected, and that such omission is improper, and that the capital of the merchants ought by law to be taxed the same as the other taxable property of the city for the purpose of paying the said judgment.

170 It is therefore ordered that the motion of plaintiff be sustained and that a peremptory writ of mandamus do issue returnable to the next term of the court, commanding and requiring the City of Memphis and its Mayor and General Council to proceed forthwith to include within the property to be taxed for the payment of the judgment of the plaintiff, in accordance with the peremptory writ of mandamus heretofore issued herein, the taxable capital of merchants for the year 1875, as heretofore returned and assessed by the city for taxation for other purposes and to lay the same rate of taxation thereon for the payment of the judgment of the plaintiff that has been levied on the other taxable property of the city and collect the said taxes so to be laid, and to pay the same over to the plaintiff forthwith as collected, according to the command of the said original writ; and that they make known at the return day of the writ how they have obeyed the same.

171 Now, therefore, in order that speedy justice may be done to the said T. E. Brown, we do command you that after the receipt of this writ, that you proceed forthwith to include within the property to be taxed for the payment of the judgment of the plaintiff, the said T. E. Brown, in accordance with the peremptory writ of mandamus heretofore issued herein, all the taxable capital of merchants for the year 1875, as heretofore returned and assessed by the city for taxation for other purposes, and to lay the same rate of taxation thereon for the payment of the judgment of the plaintiffs that has been laid on the other taxable property of the city, and to collect the said taxes so to be laid, and to pay the same over to the plaintiff forthwith as collected, according to the command of the said original writ; and do you make known at the return day of this writ how you have obeyed the writ, and this do, making such return to the Circuit Court of the United States for the

172 Western District of Tennessee, on the fourth Monday in May, A. D. 1876, the same being the day to which this writ is returnable.

Witness, the Hon. MORRISON R. WAITE, the Chief Justice of the Supreme Court of United States, and the seal of said Circuit Court, this 5th day of March, A. D. 1876.

[SEAL].

H. E. ANDREWS,
By L. H. PILLSBURY, *D. C.*

A true copy.
L. B. EATON, *U. S. Marshal W. D.*

MEMPHIS, TENN., *Mar.* 10, '76.

On the said date I personally served the original writ of peremptory mandamus upon John R. Flippin, as Mayor of the City of Memphis; and

I further made known the contents of said writ to the Board of Aldermen and the Board of Councilmen of said City of Memphis by tendering the reading of the said writ to said Board, each being in session, whereupon each Board for itself accepted service of the writ by vote of each thereof. L. B. EATON, *U. S. Marshal.*

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178 No. 1874½.

CIRCUIT COURT OF THE UNITED STATES,

(WESTERN DISTRICT OF TENNESSEE.)

T. E. BROWN
vs.
CITY OF MEMPHIS.

MOTION.

The defendants, by their attorneys, move the Court to set aside the order of this honorable Court, made and entered at the present term thereof, on, to wit, the 2nd day of March, 1876, commanding deft. to proceed to levy and collect a tax on all the taxable property in the city of Memphis sufficient in amount, after allowing, &c., to pay to T. E. Brown the sum of $125,000; and the further order to include in the taxable property of the city in which the said tax for the payment of said judgment, the taxable capital of merchants for the year 1875, as heretofore returned and assessed by the city for taxation for other purposes; and to levy the same rate of taxation thereon, and to collect said taxes, and pay the same on said judgment of T. E. Brown, and as Exhibit No.
1 to this motion herewith files the bill of complainant of E. M.
174 Apperson & Co. et als., filed in this Court upon the equity suit
thereof, against T. E. Brown and the City of Memphis, numbered
249. HUMES & POSTON, CLAPP & MINX, &
WRIGHT & FOLKES,
Attys. for Defendants.

No. 1874½.

CIRCUIT COURT OF THE UNITED STATES,

(WESTERN DISTRICT OF TENNESSEE.)

T. E. BROWN
vs.
CITY OF MEMPHIS.

Motion to set aside order of March 2, '76.
Filed May 20, '76. H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

175 "COPY OF BILL IN EQUITY."

EXHIBIT NO. 1 TO MOTION.

In the Circuit Court of the United States, for the Western District of Tennessee. In Equity.

To the Honorable the Judges of the Circuit Court of the United States for the Western District of Tennessee, in the Sixth Circuit, sitting in equity:

Humbly complaining show unto your honors your orators who are named in "Schedule A," hereto attached, and who are all resident citizens of the County of Shelby and State of Tennessee, residing at Memphis, who bring this their bill of complaint against the City of Memphis, a municipal corporation created by the laws of Tennessee, and having sites in Shelby County, in the State of Tennessee, and Taldmadge E. Brown, a non-resident of Tennessee and a resident citizen of the State of Iowa.

And thereupon your orators complain and allege:

176 First. That they are all merchants doing business under the
individual and firm names set forth in Schedule A, in the City of
Memphis, and were so engaged for and during the year A. D. 1875,
being the 48th corporate year of the City of Memphis.

That for said year the City of Memphis assessed complainants respectively on their goods, wares, and merchandise, money on hand, notes, bills receivable, and accounts due them to the amount set opposite their respective names in Schedule A (hereto attached and prayed to be taken as part of this bill), for the purpose of taxing their capital as that of merchants doing business in the City of Memphis.

Second. That under the constitution and laws of Tennessee and the charter of the City of Memphis complainants were liable to a tax of one dollar and sixty cents on the hundred dollars' worth of their capital invested in their business as merchants, and no more.

177 That this tax of $1.60 on each $100 worth of their goods, wares,
and merchandise, and money and choses in action, was laid and
collected of them respectively by the City of Memphis for the 48th corporate year, that is to say for the year 1875, A. D.

Third. That notwithstanding this fact, the City of Memphis, on the 23d day of March, 1876, passed an ordinance laying on the same property of complainants as merchants, in addition to the $1.60, the further tax of 54 cents of each $100 worth of said property for the same corporate year, that is for the 48th corporate year. And that the City Tax Collector, F. C. Schaper, has been directed and required by said city to collect this last levy of 54 cents, and that — has issued distress warrants against complainants respectively, to collect by distraint on their goods
and other personalty, said levy of 54 cents, and has had said dis-
178 tress warrants levied on their respective goods, and will proceed
to sell the same within the next two weeks unless restrained
by order of a court of competent jurisdiction, and will thus collect the said tax of them.

Fourth. That the City of Memphis passed said ordinance of March 23d, 1876, in obedience to an order of this Court made on the law side of the Court, on the 2d of March, 1876, in the case of Talmadge E. Brown versus The City of Memphis, commanding the Mayor and General Council of the City of Memphis to levy said additional tax of 54 cents on all the taxable property of the city, sufficient in amount when added to the tax heretofore levied under the original writ of mandamus therein issued, to enable the plaintiff, T. E. Brown, to realize the sum of $125,000.00, and said order of this Court commanded the City of Memphis to include in the property so to be taxed the taxable capital of merchants of the
city for the year 1875, as theretofore returned and assessed by the
179 city for taxation for the 48 corporate year, and to lay the 54 cts.
rate thereon for the payment of said Brown's judgment.

Fifth. That they are advised and allege on advice, that the City of Memphis, up to the 24th of November, 1860, was restricted expressly by law in its power of taxation to one per centum, or $1.00 on every $100 worth of taxable property within its limits for any and all purposes except certain special, express taxes for certain defined purposes, none of which embraced claims like that of T. E. Brown.

Sixth. That on the 24th of November, 1866, the General Assembly of
the State of Tennessee passed an amendment to the charter of Memphis,
authorizing the city to pave the streets with Nicholson pavement, but
expressly requiring to be specially assessed against and paid by the owners
of the lots abutting on the improvement according to the number
180 of front feet of each lot, but said act did not authorize said im-
provement to be paid for by any special tax to be laid as a general
tax on the taxable property in the city, and it did not in any manner vary the limitation on the taxing power of the city above shown. That under this act of November, 1866, the city contracted, in 1867, with Forrest, Mitchell & Co., and Taylor, McBean & Co., for the paving of certain of its streets. That these contracts, after some work by the original contractors, were, in 1868, transferred, by and with the consent of the city, to the firm of T. E. Brown & Co., of whom Talmadge E. Brown is the only surviving partner.

That T. E. Brown & Co., under said contracts, completed the paving
of a number of the streets of Memphis; that many of the abutting
lot-owners on these streets refused to pay the assessments for the cost of
said improvements in front of their lots; that suits were instituted to test
their liability for said assessments under the act of Nov. 24, 1866;
181 that the Supreme Court of Tennessee, in said suits, finally decided
said act of Nov., 1866, and the ordinances of the city passed pur-
suant thereto, and said contracts, violative of the State Constitution, and void so far as they attempted to charge the cost of the pavement by special assessment on the abutting lot-owners.

Seventh. That afterwards T. E. Brown, as surviving partner of the firm of T. E. Brown & Co., sued the City of Memphis in this Court, on the equity side, on said contracts, resting his right of recovery on the guarantee by the city of the payment of said special assessments as provided in said contracts.

That on the 19th of March, 1872, he obtained a final decree against
the city for the sum of $480,993.64; that from this decree the city ap-
pealed to the Supreme Court, where the decree was reversed, the
182 recovery abated $124,808.00 by final decree of the Supreme Court
on the 6th day of April, 1874, and a mandate awarded to this
Court to enter a new decree in accordance with the final decree of the Supreme Court.

That on the 16th of March, 1875, this court entered accordingly a final decree versus the City of Memphis in favor of Brown for $292,133.47, and awarded execution.

Eighth. That on the 22d of March, 1875, Brown filed a petition in this
Court asking a mandamus to compel the city to lay and collect sufficient
taxes to pay said judgment, expressly basing his prayer for relief on the
act of the General Assembly of Tennessee of March 18, 1873, ch. —,
sec. 1, providing that when a special assessment had been declared void
by the Supreme Court of the State the city should have power to
183 levy a tax in addition to all other taxes sufficient to pay the en-
tire cost of the improvement for which the special assessment had
been made; that an alternative writ of mandamus issued on said petition to the city on the 22d of March, 1875, and was served on the 25th

of the said month; that on the 30th of said month this Court, by decree rendered in said cause, ordered the mandamus to be made peremptory and final, and that the city should for 1875, 1876, and 1877 lay and collect in addition to and at the same time with other levies, a tax sufficient in amount to realize $125,000 each of said three years to pay Brown's decree against the City of Memphis.

That on this order a peremptory writ of mandamus issued June 24th, 1875, and was served on the city of the 29th of the same month.

Ninth. That on the 10th of March, 1876, on the ex-parte affi-
184 davit of T. E. Brown, without notice to, and without process
against, or made known to, or served on any of complainants or any of the merchants of Memphis, and without making them or any of them parties in any form to said proceeding, an order was entered in said cause awarding a peremptory writ of mandamus to the city, requiring the levy and collection of an additional tax of 54 cents on the capital of the merchants of the city, as assessed and returned for the 48th corporate year, to pay said judgment.

The ordinance of March 23d, 1876, was passed in obedience to this mandamus, and the City Tax Collector, F. C. Schaper, is attempting to collect said illegal tax of 54 cents on the $100 worth of complainants' capital for the year 1875, in obedience to said ordinance.

Tenth. Complainants insist that this tax of 54 cents for the
185 48th corporate year is illegal, unjust, and void, because the City
of Memphis, by its charter, from the original grant in 1826 down to the last amendment, ch. 92 of the acts of 1875, has no power to lay and collect said tax, but had entirely exhausted its power by levying and collecting the tax of one dollar and sixty cents for the year 1875 on the capital of the merchants of the City of Memphis.

Eleventh. That by special act passed by the General Assembly of Tennessee on the 21st of January, 1848, relating alone to the City of Memphis, the power to impose taxes for any and all purposes is restricted expressly to ¾ of one per cent. on all taxable property, (see sec. 7th, subsections 1 and 10,) and by the 13th section all prior acts inconsistent with that act are expressly repealed.

That section 9 of the special act of December 3d, 1849, expressly
186 limits the taxing power of the city again to ¾ of 1 per cent. on the
$100 worth of all taxable property for any and all purposes; that section 24 of this act expressly repeals all acts inconsistent with its provisions; that in both the acts of 1848 and 1849, just quoted, this express restriction on the taxing power of the city is contained in the same sections which empower the city to improve the streets, thus making it indubitable and demonstrable that the limitation embraces the cost of street improvements.

That section 6th of the act of January 2d, 1852, amending the two acts just referred to, expressly and in terms amends the 9th section of the act of 1849 in this: "To authorize the City of Memphis to impose on real estate an additional tax of 50 cents on the $100 worth of real property over and above the amount allowed to be imposed by said 9th section of the act of 1849."

187 This demonstrates that up to 1852 the city was expressly re-
stricted, in its tax-imposing power, to ¾ of 1 per cent. on the $100 worth of property.

That the next amendment of the city charter, passed Feby. 13th, 1854, extended its territorial boundaries and remodeled all its powers, containing some eight articles and many sections, of which article 4, section 1, expressly restricts the taxing power of the city "for the purpose of defraying the expenses incurred in administering the affairs of the city" to 1 dollar on the $100 worth of property within the city liable to taxation.

The same section provides that "the city should also have power to lay a special tax for the sole purpose of paying the interest of the bonds authorized to fund the city debt, and also the power to lay another special tax to pay the difference between the dividends on the railroad stock and the interest on the bonds issued to railroads for the stock."

And in article 4, section 4, sub-section 18, it is empowered to
188 lay "a special and additional tax for the support of a system of
free schools not less than ⅛ of ordinary city revenue."

The last clause but three of this act repeals in terms all former acts "contrary to or inconsistent with its provisions." This express restriction of the taxing power to 1 per cent. for the purposes of administering the affairs of the city, followed by express authority given to lay three special taxes, shows unmistakably the legislative intent to restrain the taxing power of the city to 1 per cent. for any and all purposes.

That the next act amending the city charter, passed Feby. 29, 1856, sec. 11, empowered the city "to provide by ordinance for the grading and paving of all the streets, &c., by the respective owners of the lots fronting thereon, and to enforce obedience thereto by such fines and forfeitures as the city might provide.

The act does not in any provision speak of or alter the taxing power.

189 The next amendment, passed Feb'y. 30, 1860, contained nothing
touching the limits of the taxing power, nor that over streets, except the following: Section 3, among other things, gives the city power "to issue time bonds not exceeding $500,000.00 for the construction and paving of the principal streets, &c., dependent on a popular vote."

Section 7th enacts that as another mode of constructing permanent streets "the city shall have power, upon the petition of ⅔ of the lot-owners on any street, to provide by ordinance for the construction and paving of such streets, and to pay for the same by special assessment on the abutting lots." Thus, it is clear, the power of the city to improve the streets and to lay taxes for that purpose remained, as under the prior acts, limited to 1 per cent. for that and other purposes, except by special assessment on the abutting lot.

The next amendment of the city charter, passed Nov. 24, 1866,
190 only contains the following provisions relative to the taxing power
or the streets:

Sec. 2nd provides that the city, "for the purpose of making any public improvement deemed necessary for the city, may issue 8 per cent. 30-year bonds, dependent on a favorable popular vote. Sec. 3rd gives the city power to require the cost of grading, paving, and repairing the streets to be borne by the abutting lot-owners, according to the frontage of each lot on the street.

Under this section the contracts on which Brown's judgment is based was made.

Thus it will be seen that at the time of the making of these contracts the taxing power of the city for the purpose of improving streets, and other expenses necessarily incurred in administering the affairs of the city, were expressly restricted to 1 per cent., except in special cases

relating to bonds and the public schools, but none of these
191 special taxes are authorized for street improvements.

In express terms the legislature had provided three special modes of improving streets and paying the cost: first, by the issuance on a favorable popular vote of time bonds; second, on the petition of ⅔ of the lot-owners on any street, the cost to be paid by them, rated according to frontage of each lot; third, by ordinance charging cost by special assessment on the abutting lot-owners, according to frontage.

If the city guaranteed the payment of the cost of such paving then the power of taxation applied.

The charter of the city expressly provides, that it may be amended or altered at any time in the discretion of the legislature, and this provision was in force when Brown's contracts were made and when his judgment was obtained.

192 Twelfth. That act of March 18, 1873, was repealed on the 23d
of March, 1875, and the tax-paying power of the city restricted to $1.60 per annum.

A duly authenticated copy of all of said acts is hereto attached as Exhibit B and prayed to be taken as a part of this bill.

Complainants further show that by article 2nd, section 28, and last clause of the constitution of the State of Tennessee, it is provided, that the capital invested by merchants in the purchase of goods sold to nonresidents shall not be taxed at a rate higher than the advalorem tax on other property.

The same section also prescribes that all property shall be taxed uniformly according to actual value, and that no one species of property shall be taxed higher than another.

The assessment for 1875, made by the city, was made under the rules prescribed by the general assessment act of 1873, ch. —, and by
193 that act the rule for assessing capital is that at the expiration of
the year the merchant shall report to assessor the highest amount in value of goods, wares, and merchandise which he had had on hand at any one time during the preceding twelve months; by another section he is required to report the amount of money in hand and on deposit, and the amount of bills receivable and other choses in action due him. On these two reports he is taxed as his capital. This was the rule by which the assessments of their capital were made in 1875 for the state, county, and city, except that the city fixed the 1st of July, instead of the 31st of December, 1875, for the report.

By the act of 1875, ch. —, the city is required to take and adopt the assessment made by the state and county under the general assessment act of 1873.

Complainants insist that this rule of the statute violates the
194 above constitutional provisions, greatly to their pecuniary injury
in this, that they respectively buy every year, and have on hand stocks of merchandise exceeding in value their actual capital invested, from ⅕ to ½ and more, as their purchases at such seasons are made in part on credit and on temporary loans in excess of their capital, and this was the fact in their respective cases in 1875, and touching their respective assessments of capital for the year 1875. So that the tax now sought to be collected of them, as shown in schedule A, opposite their respective names, is in excess of the true amount of the 54 per cent. at least ⅕ in each case, and in a great many much more.

Complainant insists that under the clauses of the Constitution of the State they can only be taxed each on the capital set apart and invested

in their respective concerns and partnerships, hence the rules of
195 assessment aforesaid prescribed by the act of 1873 are unconstitutional and void; and the assessments under them for 1875 and on which the tax of 54 cents is based, are illegal and void. They also insist that the section of said act requiring them to report as a separate item the money and choses in action in hand at the date of the report is also violative of said clause of the Constitution, leading invariably as against them to double taxation, while real estate and all other personalty is excluded under the peculiar rules of this assessment act from double taxation. And they aver that the said assessment of their capital made for 1875 were made in obedience to those rules, and are, therefore, excessive and void.

To show this more plainly, compl'ts aver that said assessments were made pursuant to sub-section 3 of section 4 of ch. 118 of the act of March 22d, 1873, as follows:

196 "To assess personal property at the same value at which it ought to be appraised in payment of a just debt in cash from a solvent debtor."

Also, sub-section 1 of sec. 20:

"All capital of a merchant invested in his stock of goods, wares, and merchandise not otherwise reported as hereafter required, to be estimated at not less than the cash value of the largest amount of such goods, wares, and merchandise on hand at any one time during the preceding twelve months."

Whereas, by sub-section 2 of section 4 of said act, real estate is to be assessed for taxation "at its market value on a credit of one and two years, deducting 15 per cent. in gross."

Said assessments for 1875 made under the foregoing rules are illegal and excessive.

They took as a basis for assessing complainants' respective
197 capitals, not the actual capital invested, but the largest amount of goods, wares, and merchandise of each on hand at any one time during the year, which, as before averred, exceeded the actual capital $\frac{1}{5}$ to $\frac{1}{2}$ and more at some period during the year. It is a fact well known that all merchants, at certain seasons of the year, when business is very active, have on hand stocks of goods worth greatly more than the actual capital invested in their business; such stocks being sometimes bought for cash in part, but by far the larger part on a credit.

Therefore, the assessment of a merchant's capital at a sum not less than the cash value of the largest amount of goods, &c., on hand at any one time during the preceding twelve months is unjust, discriminating, oppressive, and illegal, and under the semblance of laying a tax on their capital invested in business, exacts from them excessive imposi-
198 tions, rated not according to their capital, but proportioned over the capital according to the credit or energy or enterprise of the merchant.

And again, while the owner of real estate and of personal estate is required to make his report and be assessed on the 10th of January, and did so under the assessment of 1875, and so makes but one report of his taxable values for that year, on which alone he is taxed, the merchant must make his report at the expiration of the 12 months, showing therein not what he has on hand at the date of the report, but the highest amount he had on hand at any time during the preceding 12 months. And in addition he must report the amount of money and choses in action he has on hand at the date of his report, and on these two reports he is taxed.

When he had the goods on hand they embodied and represented his capital and credit; at the end of the year whatever of that same stock he had sold and had not reinvested was on hand as money or choses in action.

199 At some period of the year his credit *were* in goods; at the close
of the year they are in part or in whole in money or choses in
action for which the goods had been sold. Yet he is taxed on both.

This double taxation results from the difference in the rules of assessment, and is practically and in fact *twice the advalorem tax on other property.*

Schedule A, in the amount opposite each name, embraces both of these reports, and thereby that portion of complainants' capital which is used in the purchase of goods sold to non-residents, is taxed not as required by the clause of the Constitution, at the same rate as the advalorem tax on other property, but particularly and wholly at double the rate.

Complainants aver that in every instance during the year 1875 not
less than ¾ of the purchases made by them respectively were of goods
sold to non-residents. They further aver that at the end of the year
200 1875, in every instance at least ⅓ of the stock of goods, &c., they had
on hand at any time during the preceding 12 months were then converted and held by them respectively in money and choses in action due them for goods; so the said assessments are not only in excess of their actual capital, but represent portions of it, at least ⅓ in every instance, twice, and must, in this tax of 54 cents, result in that proportion of illegal taxation. The same facts are true touching that portion of their capital used in the purchase of goods sold to residents.

Thirteenth. That in violation of said clause of the Constitution, it again illegally discriminates between real and personal property in the mode of assessing them for taxation, in this, that from the taxable value of real estate is deducted 15 per cent., and the remainder is left to be taxed, while personal property, including goods, &c., is assessed its cost value.

Fourteenth. Complainants would respectfully show and insist,
201 on advise, that this Court had no jurisdiction or power to make
the order of March, 1876, peremptory, ordering the City of Memphis to make the additional levy on the capital of the merchants of Memphis on the assessments return for the 48 corporate year. The term of the Court at which said order was made has not yet adjourned.

The order was based on the ex-parte affidavit of T. E. Brown, made on the same day on which the order was granted, without making any one or more of the merchants of Memphis a party to the cause; without process against the city—except the alternative writ of mandamus—and without process against, notice to, or defence by complainant or any one or more of the merchants of Memphis.

Complainants respectfully submit that said order was improvidently granted, is a nullity, and should be vacated.

Fifteenth. Complainants further aver that the number of indi-
202 vidual and firm merchants who carried on said business in the
City of Memphis, for and during the year 1875, and who are still so doing, will reach several hundred; indeed, complainants number more than —— hundred, and for each one of them to bring his own suit for the prevention of said illegal taxation would necessitate the institution of several hundred suits at law; would lead to an enormous accumulation of costs, and a heavy expenditure of the time and patience of the Court. Complainants are further advised that the only and proper rem-

edy at law for each of them is a petition for writs of certiorari and supersedeas; and this Circuit Court of the United States could not entertain jurisdiction of such petitions at the suits of complainants respectively against the City of Memphis, as the only proper parties to the supposed suits would be complainants as plaintiffs, and the city as defendants, all of whom are citizens of Tennessee.

203 Complainants further show that as they cannot thus restrain
the collection of said tax of each of them by certiorari and supersedeas they will be irreparably injured to the full amount of the tax paid by each; because, first, the city will not be liable, inasmuch as the city only levies the tax in invitum under the judgment and compulsory process of the Court; and secondly, under the statutes of the State of Tennessee the property of the city is not subject to execution, and its indebtedness in bonds, judgments, and open accounts now amounts to some $6,000,000.00 of dollars, and its creditors generally would willingly take 50 cts. on the dollar for their debts, except the pltff., Brown, as they are informed and believe; so that practically to pay the tax is to lose the amount, whether any legal obstacle exists in the way of a recovery or not.

Complainants would further show your honor that T. E. Brown
204 is a resident and citizen of the State of Iowa, at Des Moines, and
has no property in Tennessee, real or personal, and should he be liable to them for the illegal exactions aforesaid it would be an unprofitable exposure and troublesome adventure for each of them to pursue him by suit into the courts of Iowa, each for his own loss, varying as they do from $50.00 to $500.00 and more, as will appear by reference to Exhibit A.

Moreover, the question of law and fact arising on this attempt to tax complainants are identical in every case, and the defendants, Brown and the City of Memphis, are also the same in every case.

Complainants therefore allege or advise that they have no complete and adequate remedy at law, and that their only effectual and adequate remedy is by bill of injunction on the equity side of this Court, restraining the
execution of said order of this Court, of March, 1867, at the pre-
205 sent, time, and inhibiting the collection of said tax by distress
warrants or otherwise from each and all of complainants.

All of which actings and doings by the defendants and each of them are contrary to equity and good conscience, and tend to the manifest wrong and injury of complainants in the premises.

In consideration whereof, and forasmuch as your orators can only have adequate relief in the premises in the honorable Court where matters of this nature are properly cognizable and relievable, may it please your honors to grant unto your orators a writ of subpœna of the United States of America, issuing out of and under the seal of this honl. Court, directed to the said Talmadge E. Brown and the City of Memphis, commanding them and each of them, on a day certain therein to be named, and under a certain penalty, to be and appear in this honl. Court, then
and there to answer all and singular the premises and allegations
206 of this bill as if the same were repeated herein by special interrog-
atories.

And may it please your honors to vacate and revoke the order aforesaid of this Court of March, 1876, commanding the City of Memphis to levy and collect the 54 cents on the $100.00 worth of property of complainants; and may it please your honors to grant unto complainants the writ of injunction issuing out of and under the seal of this honl.

Court, or issued by one of your honors, according to the form of the statute in such case made and provided, perpetually enjoining and restraining the said defendants, their officers, clerks, agents, and servants, from collecting or attempting to collect said tax of 54 cents against complainants or any of them, or from enforcing or attempting to enforce said order of this Court or said ordinance of the city; and may it
207 please your honors to grant to complainants a provisional or
preliminary injunction issuing out of and under the seal of this honorable Court, enjoining or restraining dfts. or either of them, their attorneys, clerks, agents, officers, and servants, to the same purport, tenor and effect hereinbefore prayed for in regard to said perpetual injunction; and that complainants may have such further or other relief in the premises as the nature of the circumstances of this case may require, and to this honl. Court may seem meet.

And your orators as in duty bound will ever pray, &c.

This is the first application for injunction in this case.

WRIGHT AND FOLKES,
CLAP, MINX & CLAP,
HUMES & POSTON,
Solicitors for Complainants.

208 UNITED STATES OF AMERICA,
DISTRICT OF WEST TENNESEE.

David P. Hadden, one of the complainants in the foregoing bill named, being duly sworn, deposeth and saith: That he is the complainant in the foregoing bill named, and he has read the same, and knows the contents thereof; that the matters stated therein of his own knowledge are true, and those on the knowledge of others, and on his own information and belief or advice, he believes to be true.

DAVID P. HADDEN,
for Hadden & Avery.

Sworn to before me, this 10th day of May, 1876.

H. E. ANDREWS, *Clerk.*

We waive objection to the date of the oath to the foregoing bill.

S. P. WALKER,
City Attorney.

Endorsed—No. 249. Equity. Circuit Court of the United States, Western District of Tennessee. E. M. Apperson & Co. et als.
209 vs. The City of Memphis & Talmadge E. Brown. Original Bill. Filed May 6th, 1876.

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

210 SCHEDULE A TO BILL,

Showing names of merchants and amount of tax levied.

Individual Names.	Firm Names.	Valuation.	Am't Tax.
E. M. Apperson...... G. N. Rambaut.......	E. M. Apperson & Co.........	80,000 00	432 00
Daniel Ames.......... Jas. M. Beattie........	Ames, Beatte & Co............	17,000 00	91 80
S. Adler.............. A. Adler..............	S. Adler & Bro................	3,000 00	16 20

T. H. Allen P. Nugent	T. H. Allen & Co.	50,000 00	270 00
R. A. Allison Alex. Allison J. W. Allison	Allison Bro	32,500 00	175 50
Bruce, W. S. Bruce, Joseph	W. S. Bruce & Co.	30,000 00	162 00
J. Baxter	J. Baxter & Co.	10,000 00	54 00
Joshua Brown N. Norton	Brown & Norton	8,000 00	43 20
E. G. Barnaby	E. G. Barnaby	30,000 00	162 00
J. J. Bushby	J. J. Bushby & Co.	6,000 00	32 40
L. H. Brooks J. C. Neely H. M. Neely	Brooks, Neely & Co.	75,000 00	405 00
F. W. Brodie P. M. McIntyre	Brodie, McIntyre & Co.	10,000 00	34 00
A. M. Byrd Alston Byrd	A. M. Byrd & Co.	15,000 00	81 00
G. Brown M. Holthader	Brown & Holthader	5,000 00	27 00
W. H. Brown A. M. Jones	Brown & Jones	34,000 00	183 60
W. J. Berlin	W. J. Berlin & Co.		
P. R. Bohlen R. C. Graves Huse, Loomis & Co.	Bohlen, Huse & Co.	20,000 00	108 00
P. H. Bryson S. J. Comp	Bryson & Comp.	32,000 00	172 80
W. F. Boyle L. H. Chapman	Boyle & Chapman	20,000 00	108 00
J. S. Wilkins	F. H. Clark & Co.	43,000 00	232 20
T. B. Coffey Walter Merriman	T. B. Coffey & Co.	8,000 00	43 20
H. Cloth G. H. Herben J. C. Friek	Cloth & Kittman	50,000 00	270 00
B H. Carbery Thos. Cosey	Carbery & Cosey	10,000 00	54 00
R. H. Cochran S. A. Hadlebine	R. H. Cochran & Co.	25,000 00	135 00
Wm. Cuningham	Wm. Cuningham	2,000 00	16 20
W. J. Cole. S. J. Shaw	Cole & Co.	15,000 00	81 00
E. L. Cleves	E. L. Cleves	6,000 00	32 40
J. W. Dillard R. L. Coffin	Dillard & Coffin	20,000 00	108 00
J. S. Day W. P. Proudfit. R. A. Spier	Day & Proudfit	50,000 00	270 00
J. F. Dowdry	J. F. Dowdry & Co.	6,000 00	32 40
R. M. Drake	R. M Drake & Co.	16,500 00	139 00
C. N. Erich	C. N. Erich	15,000 00	81 00
G. A. Eckerly H. J. Eckerly W. A. Eckerly	G. A. Eckerly & Bro	40,000 00	216 00

J. A. Estis Jno. C. Fizer	Estis, Fizer & Co	75,000 00	405 00
E. W. Edmonds J. M. Pettingrew	Edmonds, Pettingrew & Co.	20,000 00	108 00
Sol. Freidman Max Freidman Jacob Freidman Isaac N. Snowande.	Freidman Bros	75,000 00	405 00
H. Fursenheimer	H. Fursenheimer & Co	17,000 00	91 80
Ferguson, D. S. Hampson, H. E	Ferguson & Hampson	9,825 00	53 04
J. T. Fargason J. A. Hunt C. C. Hein	J. T. Fargason & Co	75,000 00	405 00
Wm. Frank H. Bejach	Wm. Frank & Co	15,000 00	81 00
Robert Fletcher	Robert Fletcher	20,000 00	108 00
J. R. S. Gilliland Jas. M. Goodbar Jas. L. Goodbar Alvin Goodbar	Gooodbar & Gilliland	65,000 00	551 00
C. W. Gayer J. H. McDanwith C. B. Coster	C. W. Gayer & Co	80,000 00	432 00
M. Garvin J. S. Sullivan Thomas Clarke M. J. Clark	M. Garvin & Co	40,000 00	216 00
W. B. Galbreth W. J. Crawford J. M. Fowlks	W. B. Galbreth & Co	30,000 00	162 00
W. A. Goodyear	W. A. Goodyear	15,000 00	81 00
John R. Goodwin L. D. Mathews, Jr S. M. McCullin	J. R. Goodwyn & Co	15,000 00	81 00
J. L. Hatcher	J. L. Hatcher & Co	4,500 00	24 80
H. B. Howell	H. B. Howell	20,000 00	108 00
N. L. Harris W. B. Mallory	Harris, Mallory & Co	40,000 00	216 00
R. F. Herron Jas. Connor	Herron & Connor	80,000 00	43 20
D. P. Hadden J. W. Avery J. M. Farrington	Hadden & Avery	40,000 00	216 00
N. Hill Jerome Hill N. Fontaine	Hill, Fontaine & Co	75,000 00	405 00
W. R. Hendrix D. A. Campbell J. B. Bruner	Hendrix, Campbell & Co	16,000 00	86 40
J. M. Hill	J. M. Hill & Co	10,000 00	54 00
T. Herner	T. Herner	10,500 00	56 70
H. Herzog L. Herzog H. Harden	Herzog & Bro	17,000 00	91 80

M. Holsburg	M. Holsburg	5,000 00	27 00
S. Halle	S. Halle	10,000 00	54 00
W. W. Guy J. H. McClellan J. C. Park	Guy, McClellan & Co	75,000 00	405 00
W. W. Joyner H. F. Lemon F. Gall	Joyner, Lemon & Gall	80,000 00	432 00
J. M. James W. B. James W. W. James	J. M. James & Sons	30,000 00	162 00
J. Judd — Judd	J. Judd & Bro	35,000 00	18 29
Wm. Jack A. Jack S. E. Rundsell	Wm. Jack & Co	40,000 00	216 00
R. S. Jones W. M. Brown	Jones, Brown & Co	50,000 00	270 00
A. E. Kennedy W. A. Rudd	Kennedy & Rudd	10,000 00	54 00
S. Kaufman D. Kaufman	S. Kaufman & Bro	5,200 00	28 08
D. C. Lowenstein H. M. Lowenstein — Lowenstien	Lowenstein Bro	40,000 00	216 00
A. W. Louterback M. Louterback	Louterback Bro	5,000 00	27 00
John Lilly	John Lilly	10,000 00	54 00
R. E. Lee	R. E. Lee	5,000 00	27 00
E. H. Leidy	E. H. Leidy	10,000 00	54 00
B. Lowenstein E. Lowenstein Benedict Lowenstein.	B. Lowenstein & Bro	100,000 00	540 00
L. Lewin	L. Lewin	6,000 00	32 00
G. Mitchell R. Mitchell J. P. Hoffman	Mitchell & Hoffman	56,000 00	312 00
H. H. Mette W. H. Mette	H. H. Mette & Son	15,000 00	81 00
W. R. Moore J. F. Wadkins	W. R. Moore & Co	50,000 00	270 00
W. W. McDonald J. Woodworth	McDonald & Woodworth	5,000 00	27 00
M. L. Meacham E. E. Meacham A. W. Roberts J. P. Poston	M. L. Meacham & Co	80,000 00	432 00
J. Moore J. B. Emery J. A. Moore	Moore, Emery & Co	15,000 00	81 00
L. Mosby E. P. Hunt	Mosby, Hunt & Co	20,000 00	108 00
S. Mansfield J. M. Wood	Mansfield & Co	40,000 00	216 00
E. H. Martin	Martin & Co	25,000 00	135 00

John McLoughlin	John McLoughlin	8,000	00	43	20
J. A. Menkin A. D. Menkin J. S. Menkin L. Iglam J. Kuhn	Menkin Bros	100,000	00	540	00
W. Miller	W. Miller	8,000	00	43	20
Phil. Malone	P. Malone & Co	5,000	00	27	00
L. Ottenheim M. L. Schwartz	Ottenheim & Schwartz	8,000	00	43	20
E. Orgill G. L. Dennison N. S. McNear Jno. T. Williams	Orgill Bros. & Co	55,000	00	297	00
M. C. Pearce L. B. Suggs	Pearce & Suggs	17,000	00	91	80
L. Podesta M. Modesta	L. Podesta & Co	15,000	00	81	00
C. H. Pomeroy B. J. Moreau	C. H. Pomeroy & Co	5,000	00	27	00
Porter, D. F. Taylor, W. T. W. W. Rae	Porter, Taylor & Co	75,000	00	305	00
P. Podesta Lewis Podesta N. Molestda	Podestda & Molestda	12,000	00	64	80
H. Rice W. Stix B. Esman J. Rice	Rice, Stix & Co	100,000	00	540	00
P. Roper	P. Roper	5,000	00	27	00
B. Roscoe	B. Roscoe	7,500	00	40	30
Jas. Roper John Roper	Jas. Roper & Bro	10,000	00	54	00
M. Rosin L. Rosin	Rosin & Bro	3,000	00	16	21
E. F. Rick	E. F. Rick	15,000	00	81	00
A. J. Roach M. L. Roach	A. J. Roach & Co	13,000	00	70	20
N. R. Sledge W. M. Sledge A. N. McCoy	Sledge, McCoy & Co				
B. J. Semons	B. J. Semons	20,000	00	108	00
L. Hanaur W. W. Schoolfield H. G. Miller H. Thomas	Schoolfield, Hanaur & Co	75,000	00	405	00
Pettit & Simpson	Pettit & Simpson	20,000	00	108	00
J. F. Stratton J. L. Wellford	Stratton & Wellford	20,000	00	108	00
J. A. Shane A. Harris	Shane, Harris & Co	20,000	00	108	00
D. L. Sullivan E. Sullivan	D. L. Sullivan & Bro	5,000	00	27	00

St. Bernard Coal Company		15,000 00	81 00
Singer Sewing Machine Company		15,000 00	81 00
S. Sternberg	Sternberg & Co.	5,000 00	27 00
J. G. Lick	J. G. Lick	1,800 00	9 72
C. Schmidlapp J. C. Schmidlapp J Rice S. Jacobs	Schmidlapp & Bros	15,000 00	81 00
J. Schwab L. Schwab,	Schwab & Co.	75,000 00	405 00
Chas. Stout Edwin Stout	Chas. Stout & Bro	10,000 00	54 00
John W. Taylor Levi Joy	Taylor & Joy	30,000 00	162 00
L. Taube	L. Taube	10,000 00	54 00
A. C. Treadwell A. B. Treadwell B. D. Treadwell	A. C. Treadwell & Co	75,000 00	405 00
E. Urguhart J. D. Murtagh	E. Erguhart & Co	25,000 00	135 00
Marsh	Marsh & Co	5,000 00	27 00
S. Vendig	S. Vendig	18,000 00	97 20
A. Vaccon A. B. Vaccon P. "	A. Vaccon & Co	40,000 00	218 00
T. Sherwood J. W. Houn T. M. White	Wheeler, Pickins & Co	9,000 00	48 60
Jas. Young T. H. White J. W. Caldwell	F. M. White & Co	25,000 00	135 00
A. Woodruff	A. Woodruff & Co	18,600 00	100 44
L. B. Walker G. H. Judah C. H. Meyer	Walker Bros. & Co	80,000 00	432 00
J. C. Ward J. F. Walch	J. C. Ward & Co	23,000 00	134 20
H. Welter Geo. Schwaselried	H. Welter & Co	23,000 00	134 00
David Zelna C. H. Goldham James Sutton	Zelna & Co	4,000 00	21 60

221 EXHIBIT C TO BILL.

Filed May 20, 1876.

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

STATE OF TENNESSEE,
COUNTY OF SHELBY, CITY OF MEMPHIS

On the 10th day of December, 1875, at a meeting of the General Council of the City of Memphis, the following proceedings were had, to wit:

Be it resolved, That a special tax of 54 cents on the $100.00 worth of property be and the same is hereby levied for the 48th corporate year, for the purpose of passing one hundred and twenty-five thousand dollars of the judgment rendered by the United States Circuit Conrt in favor of T. E. Brown against the city, as required by the writ of mandamus heretofore served upon us.

222 Adopted by Aldermen and Council, December 10, 1875.
Approved by the Mayor, December 14, 1875.

I, Crabtree Belcher, Register for the City of Memphis, hereby certify that the foregoing is a true copy of the resolution adopted by the General Council, December 10, 1875, approved by the Mayor, December 14, 1875, levying a tax of 54 cents on the $100 worth of property, to pay the judgment in favor of T. E. Brown versus the city, as the same appears of record in my office.

In witness whereof I have hereto set my hand and affixed the seal of said city, at office, this April 7, 1876.

[SEAL.]

CRABTREE BELCHER,
City Register.

223

AN ORDINANCE

Levying a tax of 54 cents on merchants' capital to pay judgment in favor of T. E. Brown & Co.

Whereas, an ordinance was passed on the 10th day of December last, levying a tax of 54 cents on all the property of the city, for the purpose of paying the judgment against the city in favor of T. E. Brown & Co.;

And whereas, the City Tax Collector has been advised that said ordinance did not apply to and did not lay said tax on merchants' capital; and said Tax Collector under said advice has not collected said tax from the merchants,—

Therefore, be it ordained by the General Council of the City of Memphis, that said ordinance be and the same is hereby declared to apply to merchants' capital. A special tax of 54 cents on the one hundred dollars of said capital is hereby laid for the 48th corporate year, 1875,
for the purpose of paying said judgment in favor of T. E. Brown
224 & Co., on the merchants' capital heretofore assessed and returned.

That the City Tax Collector be and is instructed to proceed at once to collect the same and pay the same over to said T. E. Brown & Co. as fast as collected.

Passed second and final reading by Boards of Aldermen and Common Council, March 27, 1876.

Approved by the Mayor, March 24, 1876.

I, Crabtree Belcher, City Register, hereby certify that the foregoing is a true copy of the ordinance levying a tax of 54 cents on merchants' capital to pay judgment in favor of T. E. Brown & Co., passed finally both boards, March 23, 1876, and approved by the Mayor, March 24, 1876.

In witness whereof I hereunto set my hand and affix the seal of said city, at office in the City of Memphis, Tenn., April 3d, 1876.

[SEAL.]

CRABTREE BELCHER,
City Register.

225 UNITED STATES CIRCUIT COURT,

(WESTERN DISTRICT OF TENNESSEE.)

Proceedings had in the Circuit Court of the United States for the Sixth Judicial Circuit thereof, Western District of Tennessee, at a regular term of said Court, began and held for its November Term, A. D. 1876, at the Federal Court Rooms in the City of Memphis, on, to wit, the 20th day of May, 1876, in the following cause:

T. E. BROWN
vs. } No. 1,874½.
CITY OF MEMPHIS.

In this cause, on the 20th day of May, 1876, the defendant moved in open Court, after due and legal notice to plaintiff and under the rules of the Court, to set aside the order of the Court made at the present term of this Court, and on the 2d day of March, 1876, commanding deft. to proceed to levy and collect a tax on all the taxable property in the City of Memphis, sufficient in amount, after allowing, &c., to pay to T. 226 E. Brown the sum of $125,000.00, and the further order to include in the taxable property of the city on which the said tax for the payment of said judgment the taxable capital of merchants for the year 1875, as heretofore returned and assessed by the city for taxation for other purposes, and to lay the same rate of taxation thereon, and to collect said taxes and pay the same on said judgment of T. E. Brown; and by consent of all parties the defendant, the City of Memphis, was permitted to and did offer, and read as part of this motion and in support of it, the bill of complaint of E. M. Apperson & Co. and others against T. E. Brown and the City of Memphis in this Court, and the same is made part of this record as Exhibit No. 1; and after hearing the said motion and bill and argument of counsel the Court disallows and dismisses said motion, and refuses to set aside or annul the said order 227 of the 2d of March, 1876, and re-orders the same as the final judgment in this cause; from which the defendant prays in open Court an appeal and a writ of error to the next term of the Supreme Court of the United States, to be held at Washington City, D. C., and the same was granted, conditioned on defendants giving bond with good security in the penalty of $25,000.00, and conditioned to prosecute the writ of error or to pay all damages and costs if it shall fail to make good its plea; and the plaintiff waived citation, notice, and the filing of the writ of error in ten days in this Court, and the bond, with satisfactory securities, was presented and approved by the Court, and the appeal and writ of error granted in open court as prayed.

228 SUPREME COURT OF THE UNITED STATES.

Know all men by these presents, that we, the City of Memphis, and John C. Fizer, for Estes, Fizer & Co.; Napoleon Hill, for Hill, Fontaine & Co.; W. B. Galbreth, for W. B. Galbreth & Co.; A. W. Roberts, for M. L. Meacham & Co.; Brooks, Neeley & Co., G. A. Eckerly & Bros., Jaynes, Lemmon & Gale, Thos. H. Allen & Co., Orgill Bros. & Co., Rice, Stix & Co., Hadden & Avery, Fursenheim & Co., H. B. Howell, Guy, McClelland & Co., M. Gavin & Co., Walker Brothers, Schoolfield, Hanaur & Co., Wm. R. Moore & Co., J. T. Fargasun & Co., are held and firmly bound unto T. E. Brown in the sum of twenty-five thousand dollars ($25,000.00), to be paid to the said T. E. Brown, his executors and administrators. To which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 20th day of May, 1876.

229 Whereas, the above-named City of Memphis hath prosecuted a writ of error to the Supreme Court of the United States, to reverse a judgment rendered by the Circuit Court of the United States for the Western District of Tennessee, in an action wherein the said T. E. Brown was plaintiff and the City of Memphis was defendant. Now, therefore, the condition is such that if the above-named City of Memphis shall prosecute its said writ of error to effect, and shall answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

ESTES, FIZER & CO.,
By JOHN C. FIZER.
HILL, FONTAINE & CO.,
By NAPOLEON HILL.
W. B. GALBRETH & CO.,
By W. B. GALBRETH.
M. L. MEACHAM & CO.,
By A. W. ROBERTS.
BROOKS, NEELEY & CO.,
By S. H. BROOKS.
G. A. ECKERLY & BRO.,
By G. A. ECKERLY.
230 JAYNES, LEMMON & GALE,
By TOM. GALE.
THOS. H. ALLEN & CO.,
By THOS. H. ALLEN.
ORGILL BROTHERS & CO.,
By JNO. T. WILLIAMS.
RICE, STIX & CO.,
By NATHAN RILEY.
HADDON & AVERY,
By J. W. AVERY.
FURSENHEIM & CO.,
By H. FURSENHEIM.
H. B. HOWELL.
GUY, McCLELLAND & CO.,
By W. W. GUY.
M. GAVIN & CO.,
By J. W. GAVIN.
WALKER BROS. & CO.,
By G. JUDDY.
SCHOOLFIELD, HANAUR & CO.,
By LEWIS HANAUR.
W. R. MOORES & CO.,
By W. R. MOORE.
J. T. FARGASUN & CO.,
By J. T. FARGASUN.

Subscribed before me, this 20th day of May, 1876.

H. E. ANDREWS, *Clerk.*

131 Endorsed as follows—No. 1,874½. T. E. Brown vs. The City of Memphis. Supersedeas. Bond of Merchants. Filed May 20th, 1876. H. E. ANDREWS, *Clerk.*

232 **UNITED STATES OF AMERICA,** *ss.*

THE PRESIDENT OF THE UNITED STATES

To the Judges of the Circuit Court of the United States for the Western District of Tennessee—Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said Circuit Court before you, between T. E. Brown and the City of Memphis, a manifest error hath happened, to the great damage of the said City of Memphis, as by its complaint appears. We being willing that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court
of the United States, together with this writ, so that you may have
133 the same at Washington on the 2d Monday of October next, in the
said Supreme Court to be then and there held, that the record
and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MORRISON R. WAITE, Chief Justice of said Supreme Court, the 20th day May, A. D. 1876.

HORACE E. ANDREWS,
Clerk of the Circuit Court for the
Western District of Tennessee.

Filed May 20th, 1876.

H. E. ANDREWS, *Clk.*
L. H. PILLSBURY, *D. C.*

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234 **UNITED STATES OF AMERICA,**

(SIXTH CIRCUIT AND DISTICT OF WEST TENNESSEE.)

I, HORACE E. ANDREWS, Clerk of the Circuit Court of the United States for said District of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the record and proceedings in said court as the same now appear of record and upon the files in my office, in the following cause, to wit: T. E. Brown vs. The City of Memphis.

In testimony whereof, I have hereunto set my name and affixed the seal of said Court, at office in the City of Memphis, this 20th day of June, A. D. 1876, and of the independence of the United States the 100th year.

[SEAL.]

HORACE E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

(Endorsed:) No. 1,874½. Circuit Court of the United States, District of West Tennessee. Talmadge E. Brown vs. City of Memphis. "Transcript."

IN THE

Supreme Court of the United States.

THE CITY OF MEMPHIS,
Appellant and Plaintiff in Error,
vs.
T. E. BROWN.

No. 599.

Brief and Argument of Humes & Poston,

Of Counsel for Appellant, the City of Memphis.

This is a writ of error to the Circuit Court of the United States for the Western District of Tennessee, asking this Court to review a judgment ordering a peremptory writ of mandamus to collect 54 cents on the one hundred dollars' worth of property of the merchants of Memphis, for the year 1875. The facts raising the questions submitted to this Court are as follows: On the 15th of March, 1875, pursuant to a mandate of this Court, said Circuit Court rendered a decree in favor of the defendant in error, and against the plaintiff in error, for the sum of $292,133.47 and costs, and awarding execution, which was issued and returned *nulla bona*.

See Record, pp. 3 and 4.

On the 22d of March, 1875, defendant in error filed his petition on the law side of said Court, asking a peremptory mandamus to compel the City of Memphis, the plaintiff in error, to levy a tax under the Act of March 18, 1873, ch. 67, p. 102, sufficient to pay said judgment. The City made return, that the Act of 1873, ch. 67, had been repealed by the Act of 1875, ch. 92, and the City had levied $1.60, the full amount it was authorized by law to levy for this purpose.

This petition and alternative writ are on pages 4, 5, 6, 7, and 8 of the Record. The City's return, p. 10.

The Court, on demurrer, overruled the defence set up in the return, and awarded a peremptory writ requiring the City to levy a tax for 1875 and 1876 sufficient to pay $125,000 each year on the judgment, and also a tax for 1877 sufficient to pay the balance of the judgment. The City levied 54 cents for 1875, but omitted to include merchants' capital.

The demurrer is on page 11.

The order of peremptory writ, page 12.

On the 2d of March, 1876, on an *ex-parte* affidavit of Brown, and without notice to the merchants, the Court ordered the City to include merchants' capital in the 54 cents levy of 1875. At the same term of the Court, on the 20th of May, 1876, the merchants, named in the record, appeared, and in the name of the City presented a motion to vacate the order of March 2d, 1876, on the grounds stated in Exhibit B, filed with their motion. The Court overruled their motion, and re-entered the order of March 2d, 1876, and granted the writ of error. The writ of error is also prosecuted by the City as to the validity of order.

The affidavit of Brown is on pages 41 to 43.

The order to include merchants is on pages 45, 46, 47.

The motion of the merchants is on page 48.

Their Exhibit B, showing the grounds of the motion, is on pages 48 to 63, inclusive.

The final order allowing this bill as part of the motion and making it part of the record and then dismissing the motion and granting the appeal is at page 64.

We rely on the following grounds of error:

1. It was error to order the levy of the tax of 54 cents on the one hundred dollars of taxable property, in excess of

the $1.60 already levied. By the levy of $1.60 the City had exhausted its taxing power.

2. The rule prescribed by sections 16 to 20, of ch. 118, of the Statute of the 25th day of March, 1873, for assessing the capital of merchants for the 48th corporate year, violates art. 2, sec. 28 (last clause) of the State Constitution, requiring that the capital of merchants invested in the purchase of goods sold to non-residents shall not be taxed higher than the *ad valorem* tax on other property, and that all property shall be taxed uniformly, and according to value, in that it takes as the minimum of value the largest amount of stock on hand during the year.

3. The order to levy the tax in question on the merchants was based on the *ex-parte* affidavit of T. E. Brown, made on the same day on which the order was granted, without making any one of the merchants of Memphis a party to the cause; without process against the City, except the original, alternative writ of mandamus, and without process against, notice to or defence by any one or more of the merchants of Memphis.

4. It was error to adjudge the property of any particular tax-payer, or class of tax-payers, liable to the tax in question. The Court had jurisdiction only to order the levy of a tax on all taxable property, and to enforce that order by proper proceedings against municipal officers in case of disobedience. It had no jurisdiction to adjudge the liability to taxation of any particular property, or the correctness of an assessment thereof already made—questions that could only properly rise between the City and the tax-payer, of which the State Courts would have no jurisdiction, and which could not properly be drawn into the Federal Court by the fact that the tax was levied under a *mandamus* from that Court

We insist that, by express provision of law, the taxing power of the City, at the dates of Brown's several contracts, was limited to 1 per cent. on the $100 worth of property; and that the Act of 1873, ch. 67, p. 102, extending this power indefinitely, was repealed expressly by the Act of 1875, ch.

92, sec. 21, p. 168; therefore the City could not legally levy the 54 cents on the merchants, in addition to the $1.60 previously levied and collected.

This proposition we have fully argued in the joint brief of Walker, Humes, and Poston, filed in No. 941, and now before this Court with this case. We respectfully refer the Court to that brief, without troubling them with a repetition of it here.

We now pass to the consideration of the second assignment of error, and insist that the assessment for 1875 is void, because the Assessment Act of 1873, ch. 118, p. 168, requires all merchants to report at the end of each year *the value of the largest stock of goods on hand at any one time during the year, and this shall be taken as his capital for taxation that year.* The assessment on the merchants of Memphis was made under this rule for 1875. Such assessments exceeded in every instance the actual capital of the various complaining merchants one-fifth to one-half their value.

The Constitution of the State, Article 2, section 28, provides that taxes shall be uniform, and no one species of property shall be taxed higher than another; and further, that that portion of a merchant's capital used in the purchase of goods sold to non-residents, shall not be taxed higher than the *ad valorem* tax on other property.

Under the provisions of the Assessment Act of 1873, ch. 118, sections 23, 24, and 25, all other personal property is assessed at its actual cash value at the date of assessment, but the capital of merchants is not so assessed; but the largest and most valuable stock on hand at any one time during the year is taken as the capital stock, and in every instance this exceeds the actual capital. The Constitution declares that the capital of merchants used in the purchase of goods sold to non-residents shall only bear the *ad valorem* tax imposed on other taxable property. Capital does not mean the highest amount of goods on hand at one time during the year—this includes capital and goods bought on a credit. Capital means the property or money of the merchant set apart from other uses and permanently invested in business. It does not mean temporary credits, procured either in money borrowed, or goods bought, on a credit.

The constitutionality of this mode of assessing *merchants' capital*, under ch. 118 of the Acts of 1873, has never been decided by the Supreme Court of Tennessee. The Constition of 1834 did not contain the same or similar provisions to those above quoted from the 28th section of 2d Article of the Constitution of 1870, for the protection of merchants' capital; and ch. 118 of the Acts of 1873 is the first Assessment Act under the Constitution of 1870 affecting merchants' capital.

> See Constitution of Tennessee in Thompson & Steger's Statutes of Tennessee of 1871, volume 1, p. —.

It must be kept in view that the cause is here on the legal sufficiency of the facts as stated in the bill of the merchants, Exhibit "B" to their motion. For a statement of the facts alleged by the merchants on this point see pp. 53–55 of Record.

In Bailey vs. Clark, 21 Wallace R., 287, his Honor, Judge Field, delivering the opinion of this Court, says: "The term capital does not embrace temporary loans and credits, but *the property taken from other investments or uses and set apart permanently for and invested in the special business.*" "It means the fixed capital employed in that business." *This* case is identical with ours on all the facts, and conclusive of the question.

> Bailey vs. Clark, 21 Wallace R., 288.

The fourth assignment of error, that the Court could not adjudge the property of any particular tax-payer, or any class of tax-payers, liable to the tax in question, is so manifest we don't think it requires argument. The Court had jurisdiction to order the levy of a tax on all taxable property, and to enforce obedience to that order by proper proceedings against municipal officers in case of disobedience;

but it had no jurisdiction to adjudge the liability to taxation of any particular property or the legality of assessments already made. These questions could properly arise only between the City and the tax-payer, and are peculiarly proper for the State Courts, involving, as they do, questions of State taxation under State laws wholly disconnected from contracts.

United States v. New Orleans, 2 Wood, 230.
High on Extraordinary Remedies, sec. 7.

The suit of Brown is against the City, and the judgment requires the City to levy a tax. Does that give to the Court making the order the jurisdiction to call into its forum all the litigated claims of the City against all its tax-payers, its debtors, or tort-feasors, and there to adjudicate them without notice to defendants and without power to defend?

No Court of Law or Equity, in a suit by a creditor against a private corporation, would assume jurisdiction, after ascertaining the debt against the corporation, to decide and enforce the liability of stockholders to the corporation, in order that it might enforce satisfaction of its judgment against the corporation, and especially without making them parties. The citizens are corporators or stockholders of a municipal corporation, and as to their liabilities to the corporation stand on the same footing, as to this matter, as shareholders in a private corporation.

The City is not their representative when it seeks to obtain from them money on liabilities or burdens. The principle announced by Mr. Justice Hunt, in delivering the opinion of this Court, in 19 Wallace R., 119, in the case of Reese vs. Watertown, is appropriate here—"that the citizen must be a party to any proceeding seeking to subject his individual property."

We admit that a receiver may bring into a Court of competent jurisdiction debtors to the fund, or Courts may order him to bring suits for torts; but surely no Court would attempt to adjudicate such claims in the original suit without service of process on the particular debtors, under the idea of aiding its receiver. Nor would it do so in aid of a mandamus, but it would leave such claims to a separate litigation in the appropriate Court. If this be the case how much more would it be so as to a jurisdiction so peculior as that of a taxing tribunal. No Court of Equity would assume to call before it at the suit of a sequestrator or receiver one who had committed a tort upon the judgment debtor. It might order him to sue for the tort; so it might order the receiver to institute proceedings in the State Courts to compel the levy of the tax, but it could not itself properly undertake to assume the functions of a Tax Court any more than the ascertainment of damages proper for a jury.

As counsel for the merchants we urged the Court below for a stop-order, and a direction to us to go into the State Court and settle the liability of the merchants, under the State Constitution and State revenue laws, to this tax. We urged, that as to this liability, the merchants of Memphis, and the City of Memphis were residents of the same State, that the questions were not such as raised the impairment of a contract or any other Federal inquiry, but they were questions of State taxation, between the State acting through one of its subordinate, local, civil governments, and its citizens, and peculiarly fit for a State tribunal We called attention to the opinion of the Court delivered by his honor, Mr. Justice Swayne, in Christmas vs. Russell, 3 Wallace R., 369, expressly recommending such a course.

We here again ask the application of this rule.

HUMES & POSTON,
Counsel for Plaintiffs in Error.

We add as follows to the foregoing brief:

The decision of the Supreme Court of Tennessee, delivered by McFarland, has no application. It is the manuscript opinion filed with Mr. Randolph's brief. That Court in that elaborate opinion dismissed the merchants' petition on the sole ground that the jurisdiction of the Federal Court had attached before that of the State Court, and hence the latter Court could not take cognizance of the case. After thus disposing of the case, it is true, the Judge delivering the opinion uses the language quoted on the 13th page, last paragraph, of the brief of Wm. M. Randolph. But that is a pure dictum; and besides is not on the point of the unconstitutionality of the Assessment Act of 1873, but is on the point of excessive assessments under the act.

We do not complain of want of conformity to the Assessment Act by an excessive or irregular assessment; but we complain *that the Assessment Act of* 1873 *is void, because it prescribes a rule of assessment violative* of the Constitution, article 2, section 28, in this: that instead of prescribing a rule to assess the capital of merchants according to its actual amount, it prescribes one fixing the highest amount of goods on hand at any one time during the year. This rule, the petition alleges, and it is not denied, adds to the real value of the capital one-fifth to one-half, and did so in 1875.

The question, we submit, is not one touching an irregular and excessive assessment, under the Assessment Act, but it directly attacks the Assessment Act itself as prescribing a rule violative of the Constitution, and which, if we are right, is absolutely void, and a mere nullity. Judge McFarland, in his dictum, was not referring to this question, otherwise he would not have said, in the extract quoted by Mr. Randolph, as follows: "If the assessments were wrong the statutes, we think, provide a mode for correction or redress." The statutes do provide a mode of redress in case of excessive and irregular assessments under the act; but this mode of redressing irregular assessments does not contemplate an attack *on the validity* of the act as unconstitutional, but simply refer to the correction of irregularities in the assessment under the act. The Court will see the last clause quoted from Judge McFarland's dictum is absolutely meaningless if applied to our position here.

The very thing we are complaining of is that the rule prescribed by the Assessment Act of 1873 destroys the rule of uniformity as to merchants.

Again, the Court must see that the privilege-tax has nothing to do with the ad valorem rule of the Constitution touching that portion of the capita' used in the purchase of goods sold to non-residents. The Supreme Court have expressly decided that this portion of the capital can only be taxed ad valorem, as other property. Now, this rule would be utterly futile if the rule of the Act of 1873 is sustained.

Friedman vs. Mathes, 8 Heisk., 488.

The City, it is true, levied its tax under an ordinance, but still it was under the Assessment Act of 1873, as it expressly required by the act of 1875.

HUMES & POSTON,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1877.

CITY OF MEMPHIS,
vs.
TALMADGE E. BROWN,
No. 599.

STATEMENT OF CASE AND BRIEF FOR DEFENDANT IN ERROR.

Tracy & Co., Printers, 295 Second St., Memphis

same to him on account of what was due him from time to time as collected. Record, p. 4–7.

An alternative writ was awarded, issued and served, and made returnable on the 26th of March, 1875, and on that day the Mayor and the members of the General Council on behalf of the city filed their return or answer, wherein they set up various reasons why they or the city should not comply with the requirements of the writ. Record, p. 7, 9–10.

Brown filed a demurrer to the return or answer, and on the 30th of March, 1875, the cause was heard on the demurrer, and the court adjudged that the demurrer be sustained; and the defendants saying nothing further in bar of the remedy sought by the plaintiff, the court further adjudged that "the City of Memphis and its General Council proceed each year for the ensuing three years—that is, 1875, 1876 and 1877, respectively—at the same time and in the same manner that other city taxes are assessed and levied and collected, to assess, levy and collect upon *all* the property within the city *taxable by law* a tax in addition to all other taxes allowed by law, payable in the lawful money of the United States of America, sufficient in amount, after making due allowance for all delinquencies, insolvencies and defaults, to realize one hundred and twenty-five thousand dollars each year for the years 1875 and 1876 respectively, and so much of the said sum for the remaining year 1877 as may be necessary to pay and satisfy the balance of the said decree, including costs and interest, not satisfied by the taxes collected and paid over during the two preceding years, and to pay over the same as fast and from time to time as the same might be collected directly to the said Talmadge E. Brown or into court to be forthwith paid him without the further order of the court until the whole amount of the said decree, including the costs of the suit and the interest that has accrued or may accrue thereon, be paid and discharged." Record, p. 11–12.

And it was further ordered that the Clerk of the Court, whenever Brown should request it, issue each year during the said years 1875, 1876 and 1877, respectively, a peremptory writ of mandamus, in accordance with the foregoing judgment, to be served on the City of Memphis and its Mayor and General Council in the manner prescribed by law.

The peremptory writ of mandamus for the year 1875 under the foregoing judgment was issued on the 28th of June, 1875, and was served on tde 29th of June, and return made of the service by the Marshal. On the 10th of December, 1875, the General Council of the city passed the following ordinance, approved by the Mayor on the 14th of December: "That a special tax of 54 cents on the $100 worth of property be and the same is hereby levied for the 48th corporate year (1875) for the purpose of paying one hundred and twenty-five thousand dollars of the judgment rendered by the United States Circuit Court in favor of T. E. Brown against the city, as required by the writ of mandamus heretofore served upon us." Record, p. 13–14.

On the 9th of February, 1876, the city and General Council filed what purports to be a return to the peremptory writ of mandamus. Record, p. 15–39.

Brown moved to strike out the return, and the court, on the 2d of March 1876, ordered it to be stricken out. Record, p. 39–41, 44.

On the 1st March, 1876, Brown filed an affidavit stating that the tax which had been levied for the year 1875, under the peremptory writ of mandamus, was insufficient to pay the sum of one hundred and twenty-five thousand dollars as contemplated by the writ; that the taxes levied were not being collected on the capital of merchants, which was assessed or listed for taxation separately from the other taxable property of the city. That the amount of the capital of merchants so assessed for taxation for the year 1875 was about the sum of six millions of dollars, and the rest of the taxable property of the city assessed for taxation, after allowing for errors and overvaluations, was about twenty-three millions dollars. That certain descriptions of property of the assessed value of nine millions, included in the said twenty-three millions, were claimed to be exempt, upon certain facts stated, from the tax to pay his decree. He then stated that he was advised that the capital of merchants was legally taxable to pay his decree, and that the same tax should be levied and collected thereon for the payment thereof as on the other taxable property, and that the city should be compelled by an alias writ of mandamus to include the capital of merchants in the taxable property for the payment of his decree, and to collect the tax thereon and pay the same over as commanded by the original writ. He then stated the insufficiency of the levies, as they were being collected to pay the one hundred and twenty-five thousand dollars he was entitled to under the judgment of 30th of March, 1875, for the year 1875, and prayed an *alias mandamus* commanding an additional levy for the year 1875, in which merchants' capital should be included as taxable, sufficient to make up the one hundred and twenty-five thousand dollars he was entitled to.

Record, p. 41–44.

On the 2d of March, 1876, the parties—Brown and the city—appeared by their attorneys, and the cause was heard on the affidavit of Brown and his motion that a peremptory writ of mandamus issue requiring the city to include in the taxable property of the city on which the tax for the payment of his decree had been levied under the peremptory writ of mandamus before issued the taxable capital of merchants as theretofore returned and assessed by the city for taxation for other purposes, and to lay the same rate of taxation thereon for the payment of the said decree as on the other taxable property of the city, and to collect the taxes so to be laid and pay the same over to him forthwith from time to time as collected, according to the command of the original writ.

And it appearing to the court that the taxable capital of merchants for the year 1875 had not been included amongst the taxable property of the city on which the said tax for the payment of the said decree was being collected, and that such omission was improper, and that the capital of merchants ought by law to be taxed the same as the other taxable property of the city for the purpose of paying the said decree, the court ordered that the motion of Brown be sustained, and that a peremptory writ of mandamus issue commanding the city to proceed forthwith to include within the property to be taxed for the payment of Brown's decree, in accordance with the peremptory writ before issued, the taxable capital of merchants for the year 1875 as before returned and assessed by the city for taxation for other purposes, and to lay the same rate of taxation thereon for the payment of Brown's decree that had been levied on the other taxable property of the city, and to collect the said taxes so to be laid and to pay the same over to the plaintiff forthwith as collected, according to the command of the original writ, and to make known on the first day of the next term, the return day of the writ, how the same had been obeyed.

Record, p. 45–46.

The writ of mandamus was issued on the 5th of March, 1875, according to the judgment, and was executed on the city on the 10th of the same month.

Record, p 46–48.

On the 23d of March, 1876, the city passed an ordinance, approved by the Mayor on the next day, referring to the ordinance of 10th of December, 1875, and the fact that the City Tax Collector, under advice, had not collected the tax levied by the ordinance from the merchants on their capital, and ordaining that the said ordinance be and the same was thereby declared to apply to merchants' capital, and that a special tax of fifty-four cents on the one hundred dollars of said capital was thereby laid for the 48th corporate year (1875) for the purpose of paying said decree in favor of Brown on the merchants' capital before assessed and returned, and that the Tax Collector be and he was instructed to proceed at once to collect the same and pay the same over to Brown as fast as collected.

Record, p. 63.

On the 20th of May, 1876, the city filed in the court a written motion to set aside the judgment of 2d of March, 1876, commanding the collection of the tax from the capital of merchants, and filed as an exhibit to the motion a bill of complaint of certain merchants from whose capital it was attempted to collect the tax.

Record, p. 48, 64.

The object of referring to the bill of complaint, I suppose, is for the grounds of the motion, though the motion does not say so.

The grounds of the motion to be gathered from the exhibit are about these:

1. The act of the Legislature of the State of Tennessee of March 23d, 1875, Acts of 1875, ch. 92, sec. 64, limited the power of the city to levy taxes for all purposes to one dollar and sixty cents, and the merchants had been charged and had paid on their capital as returned and assessed for taxation for the year 1875 taxes

at and after that rate over and above the tax ordered to be levied for the payment of Brown's decree.

Record, p. 49–53.

2. There was no power to levy a tax to pay Brown's decree, inasmuch as the act of March 18th, 1873, was repealed by sec. 81, of ch. 92, p. 167–168, of the Acts of 1875; and outside the act of 18th of March, 1873, there was no grant of the power to the city to levy the tax.

Record, p. 53.

3. The Constitution prescribes that all property shall be taxed uniformly according to its value, and that no one species of property shall be taxed higher than another, and that the portion of the capital of merchants invested in the purchase of goods sold to non-residents shall not be taxed at a rate higher than the *ad valorem* tax on other property. That by the State law under which the capital of merchants for the year 1875 had been listed for taxation by the city, Acts of 1873, ch. 118, secs. 4, 16, 17, 20, etc., the largest amount of goods the merchant had on hand at any one time during the year and his bills receivable and money on hand, were assumed to be and were assessed as his taxable capital. (By reference to the act of the Legislature, Acts of 1873, ch. 118, secs. 20 and 23, p. 174, 175, it will be seen this statement is a mistake of facts.) And while under the law fifteen per cent. had been deducted from the market value of real estate on a credit of one and two years to arrive at its taxable value, no such deduction had been made in the case of a merchant's capital, but its actual value arrived at as above stated, to-wit: by taking the value of his largest stock of goods and his bills receivable and money, had been taken as the taxable value of his capital and taxes levied thereon.

Record, p. 53–55.

4. That the court had no jurisdiction or power to make the order of March, 1876, directing the city to make the levy on the capital of merchants. The merchants had no notice of the order and no process was served on them, and no process had been served on the city except the alternative writ of mandamus.

On the 20th of May, 1876, the court, after hearing the parties by their counsel, disallowed and dismissed the motion to set aside the order of the 2d of March, 1876, and reordered the same as the final judgment in the cause.

The present writ of error has been sued out to the above judgment.

One fact to be noticed particularly is that the judgment of 2d of March, 1876, commands the city to include within the property to be taxed for the payment of Brown's decree "the taxable capital of merchants for the year 1875, as heretofore returned and assessed by the city for taxation for other purposes," and to lay the same rate of taxation thereon for the payment of the decree "that had been levied on the other taxable property of the city."

Record, p. 46.

And another that it is admitted in the exhibit to the motion that the city for the year 1875 assessed the merchants respectively "on their goods, wares and merchandise, money on hand, notes, bills receivable and accounts due them to the amounts set opposite their respective names in the schedule" made a part of the exhibit "for the purpose of taxing their capital as that of merchants doing business in the city of Memphis," and that the tax of one dollar and sixty cents on each one hundred dollars worth of their goods, wares and merchandise and money and choses in action, which, it is insisted, is the limit of the taxes that could be imposed on them, "was laid and collected of them respectively by the city" for the 48th corporate year, that is to say 1875.

Record, p. 49.

And third by taking the assessed capital of any merchant contained in the schedule, and calculating a tax thereon at the rate of fifty-four cents on the one hundred dollars of it, the amount of taxes charged such merchant, as appears by the said schedule, for the payment of Brown's decree, will be the result.

Record, p. 57–63.

I do not propose to say anything in this brief on the question whether the limit prescribed in Section 63 of ch. 92, p. 159 of the Acts of Tennessee of 1875, had the effect of preventing the levy of any tax to pay Brown's decree.

That question is fully discussed in the brief in case No. 941, to which I refer.

See pages 9–13.

Nor will I discuss the question whether the Legislature could repeal the act of 18th March, 1873, so as to affect Brown's right to have the tax therein authorized, levied; nor the question whether independent of the said act of 18th March, 1873, the city had the power to levy a tax for the payment of Brown's decree.

Those questions are discussed fully in the brief referred to.

See pages 17–29, 32–39.

I

Then the question here is, was there anything in the mode of assessing or arriving at the taxable capital of the merchants for the year 1875, on which the tax to pay Brown's decree has been imposed, which renders such tax unlawful?

After providing in Section 28, Article II, of the Constitution of Tennessee for the manner to be pursued in the taxation of property it is declared as follows:

"But the Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct."

And then there is this restriction imposed:

"The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State shall not be taxed at a rate higher than the *ad valorem* tax on property."

The next section authorizes the General Assembly "to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner *as shall be prescribed by law;* and all property shall be taxed according to its value, upon the principles established in regard to State taxation."

Constitution, Article II, Sec. 29.

The act of 16th January, 1871, Acts of 1870–1871, ch. 50, p. 58–59, copied in the brief for the defendant in error in No. 941, p. 13, submitted along with this case, grants to the several counties and incorporated towns of the State, in which last division cities are included, the power "to impose taxes for county and corporation purposes respectively," without limit as to amount.

And Secs. 63 and 64 of the act of 23d March, 1875, Acts of 1875, ch. 92, p. 159–160, also copied in the brief mentioned above, p. 9, though containing limitations as to the amounts that may be levied, are in effect implied grants to the City of Memphis of the power to levy taxes.

It is settled by the decisions that the Legislature has authority to grant the power to levy taxes to cities and incorporated towns.

Hope vs. Deaderick, 8 Humphreys, p. 1, 8–9.
Nichol vs. The Mayor, 9 Humphreys, 252.
And see Cooley on Taxation, p. 51.

And that a county, city or incorporated town, in the absence of legislation to the contrary, may levy and collect taxes according to the general mode prescribed by the Constitution or law of the State.

Hope vs. Deaderick, 8 Humph., 1, 9–10.
Dillon on Municipal Corporations, Sec. 613.

And a municipal corporation having the power to levy taxes, may tax privileges taxable by the law of the State as well as property.

Mayor vs. Althrop, 5 Coldw., 554, 558.
Mayor vs. Guest, 3 Head, 413.

Among the taxable privileges enumerated in the law of the State is the occupation and business of "merchants, commission, wholesale and retail."

Acts of 1873, ch. 118, sec. 46, p. 180.
French vs. Baker, 4 Sneed, 193.

And in addition, by the charter of Memphis it is expressly given power "to license and regulate * * * * forwarding and commission, and all other mercantile houses * * * * and tax the same." Act of 23d March, 1875. Acts of Tennessee of 1875, ch. 92, sec. 55, p. 156–157.

While it is safe for a municipal corporation to conform in the exercise of the power of taxing privileges to the principles established in regard to State taxation, and to tax them in the proportion in which the State taxes them, a want of exact conformity in this respect would not make the tax void; for the corporation may tax privileges in what proportion it chooses, provided the inequality be not such as to make it oppressive on a particular class of the community.

Mayor vs. Beasley, 1 Humphreys, p. 232, 241.
Adams vs. Mayor, 2 Head, 363, 366–367.
Mayor vs. Althrop, 5 Coldw., 554, 558.
Mayor vs. Dixon, 8 Heiskell, 864.
And see Byrd vs. Ralston, 3 Head, 477.

It will be noticed that while the rules prescribed for the taxation of property are that all shall be taxed, with certain specified exemptions, and shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State, and no one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value, and these rules apply to counties and incorporated towns as well as the State, no such rules are prescribed for the taxation of merchants, peddlers and privileges.

As to them it is said the Legislature shall have power to tax them "in such manner as they may from time to time direct." No restriction in respect to the taxation of them is imposed upon counties or incorporated towns. They may impose taxes "in such manner as shall be prescribed by law," subject only to the qualification as *to all property*, that it "shall be taxed according to its value upon the principles established in regard to State taxation."

The distinction between property and privileges as respects taxation has been recognized in Tennessee from time immemorial, and the measure of the mode and rate of taxation of the latter has always been admitted to be the discretion of the Legislature.

Mayes vs. Erwin, 8 Humphreys, 290.
French vs. Baker, 4 Sneed, 193.
Woolman vs the State, 2 Swan, 353.
State vs. Crawford, 2 Head, 460.
Byrd vs. Ralston, 3 Head, 477.
Naff vs. Russell, 2 Coldwell, 36.
Commissioners vs. Patterson, 8 Jones' N. Ca. Law, 182.
Cannon vs. Mathes, 8 Heiskell, 504.
Nathan vs. Louisiana, 8 Howard, 73.
Cooley on Taxation, p, 3–5 and 384–395.

Until the year 1873 the State made no attempt to graduate the tax upon a merchant by reference to his capital invested. Before then he was taxed upon all his purchases, wherever made, during the year, which necessarily involved the taxation many times during the same year, of the real capital he had invested.

See the Code of Tennessee of 1858, sec. 678–682, and sec. 553, sub-section 6 and the cases cited above.

This system of taxation was always held lawful by the State courts and a system not very different from it was sustained by the Supreme Court of the United States in Woodruff vs. Parham, 8 Wallace, 123.

Hinson vs. Lott, 8 Wallace, 148.
And see Harrison vs. Vicksburg, 3 Smedes & Marshall, 581, 586.

The objections made on the other side to the State law under which it is alleged the capital of merchants was assessed for taxation in this case, Acts of 1873, ch. 118, p. 168, secs. 4, 16, 17, 20, etc., are substantially two: First, it is objected that the Legislature had no right to assume arbitrarily, as it did, that the capital of a merchant subject to taxation was equal to the value of the largest stock of goods he had on hand at any one time during the year. And, second, there is a discrimination against the merchant in this—that while the value of the largest stock of goods he has on hand during the year is assumed to be his taxable capital, the taxable value of real estate is ascertained by deducting from its market value on a credit of one and two years fifteen per cent. of such value, and taking the remainder as the sum to be taxed.

It must be admitted that these objections go merely to the mode of ascertaining the value or amount of the taxable capital of a merchant.

If such capital be considered as property, and the rules applicable to the taxation of property be applied to the taxation of it, the objections are groundless because one of those rules, as declared by the Constitution, is that the value of the property to be taxed is "to be ascertained in such manner as the Legislature shall direct."

But the capital of the merchant is not taxed as property, and the rules applicable to the taxation of property are not to be looked to in determining the lawfulness of the assessment.

The capital is referred to merely as a mode of graduating and fixing the tax on the merchant, and the tax is imposed not on his capital as property, but on his occupation or privilege of doing business, and is in every sense a privilege tax.

The power of the Legislature to arrive at the tax it will put upon a privilege by any mode it chooses to adopt cannot be subject to serious question.

The State vs. Crawford, 2 Head, 460.

In the State Railroad Tax Cases, 92 U. S. (2 Otto), 575, it became necessary for this court to examine many of the questions involved in this case. The Constitution of Illinois, which was involved there, was somewhat similar to the Constitution of Tennessee, except that our Constitution does *not*, as the Constitution of Illinois does, require that in levying privilege taxes the tax shall be "uniform as to the class upon which it operates." In discussing the question whether the tax in question there was unequal to the prejudice of the party complaining, the court said:

"There can be no doubt that all the classes named," mentioning those upon which a privilege tax was allowed to be imposed, "are taken out of the general rule of uniformity prescribed by the first clause, and the only limitation as to them is that of uniformity as to the class upon which the law shall operate; that is inn-keepers may be taxed by one, ferries by another, railroads by another, provided that the rules as to inn-keepers be uniform as to all inn-keepers, the rule as to ferries uniform as to all ferries, and the rule as to railroad companies be uniform as to all railroad companies." The court then remarked that it saw no evidence of a violation of the rule of uniformity in that case, and proceeded:

"But suppose it were otherwise, perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which the most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens in all the localities of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature, and of the evidence on which human judgment is founded."
92 U. S. (2 Otto), 611–612.

In Merchants of Memphis vs. City of Memphis and Schaper, Tax Collector, MSS op. by Supreme Court of Tennessee, Jackson, September term, 1876, where the merchants taxed were seeking to avoid the taxes now in question on the very assessments of their capital that are now urged to be illegal, the court said:

"One ground taken in the petition amounts in substance to this: That the assessments of their capital for the year 1875 were too high; that they are each being required to pay upon a larger capital than they should be. This, we think, in any view is not a ground to supersede the distress warrants in this case. *Petitioners do not appear to have complained of these assessments. On the contrary, they show that they paid the general levy upon this assessment without complaint.* If the assessments were wrong the statutes we think provide a mode for correction or redress. Besides, we think there is nothing in the question made. The provision of the Constitution relied upon means simply that no merchants tax—that is, the privilege tax upon merchants—shall be levied upon that part of their capital used in buying goods to sell to non-residents, but the property tax upon merchants shall be uniform with the general property tax.

If the act, as is contended, really requires merchants to pay tax upon goods not paid for and also money and choses in action, this is no more than is required of others. In many instances persons are required to pay taxes on land for which they have not paid the purchase money, and the persons to whom they owe the purchase money are also required to pay taxes upon the debts thus due them; in reality paying twice on the same property. And other similar instances of practical inequality might be cited."

See pages 28–30 of the certified MSS. copy of the opinion furnished the court with this brief.

An act almost identical with the act now in question, Acts of 1873, ch. 118, secs. 16, 17, 20, etc., has recently been before the Supreme Court of Tennessee, and has been sustained as a valid law. Jenkins vs. Erwin, 8 Heiskell, 456. And see Friedman vs. Mathes, 8 Heiskell, 488, 492–499.

Whatever might be the opinion of this court on the question as an original one these decisions are conclusive on it.

State Railroad Tax Cases, 92 U. S. (2 Otto), 575, 617–618.

But the truth is that the tax has not been levied under the State law at all, but under an ordinance of the city which provides that only a tax *ad valorem* on the capital invested, and no privilege tax whatever, unless the *ad valorem* tax is less than twenty-five dollars, shall be levied or collected by the city from merchants, and that the merchant's taxable capital shall be taken to be the value of his stock of goods on hand on the first day of July preceding the assessment, a time when notoriously the stock is smaller than at almost any other time during the year, augmented by the value of his notes, due bills, negotiable paper and accounts due from solvent parties, and all other assets, including cash, and decreased by the *bona fide* indebtedness of such merchant in connection with his said business.

Ordinances of Memphis of 1876, secs. 211–220, pages 95–99.

It may well be asked, what fairer mode of arriving at the taxable capital of a merchant could be devised? See what the court said on an analogous question in State Railroad Tax Cases, 92 U. S. (2 Otto), 575, 604–607 and 608.

By law the published ordinances of the City of Memphis are to be taken judicial notice of as public laws are.

Acts of Tennessee of 1875, ch. 92, sec. 79, p. 166.

Then the question discussed in reference to the State law may properly be laid out of the case.

And the court will not omit taking notice that no contest has been made by the merchants or by the city as to the lawfulness of the assessment of their capital for taxation so far as concerns the levy and collection of *other taxes.* They show in their motion, as already stated, that they acquiesced in the assessment as to those taxes, and have paid them, and the city has collected them on the amounts of capital put down to them. It is only as to the tax sought to be collected to pay Brown's decree that the objection *that* the assessments are illegal, is made. Now why this invidious distinction? If lawful for *other purposes,* why are not the assessments lawful as a basis for ascertaining the proportions in which the merchants ought to pay taxes to discharge Brown's debt?

I submit this court cannot for a moment tolerate such a pretext of defense. Its plain object is to hinder, I may almost say contumaciously, the enforcement of a decree pronounced by the Circuit Court under the explicit direction of this court itself. And at the very same time the pretended defense is put forward the court is told it would not avail the parties, or they did not desire it should avail them, in avoiding the payment of other taxes, to which it would have been an equally conclusive bar, and which differ in the obligation to pay them only in the circumstance that they *are not* exacted under the compulsion of Federal authority, while the taxes here involved *are.*

By reference to the city ordinances, as well as to the schedule to the bill, made an exhibit to the motion and the bill itself, already referred to and in the record at pages 18, 48–62 and 63, it will be seen that the tax the city is attempting to prevent being collected from the merchants is an *ad valorem* tax on their assessed capital exactly the same as the *ad valorem* tax levied for the purpose of paying Brown's decree on all the other taxable property—that is to say, all the other taxable property of the city is taxed for the purpose fifty-four cents on the one hundred dollars in value, and the assessed capital of merchants is taxed precisely at the same rate for the same purpose.

This statement disposes of the second point in or ground of the motion, as the Constitution itself, in the provision relied on by necessary implication permits the levy of a tax on the entire capital of merchants, and in restricting the power as to the taxation of the portion "used in the purchase of merchandise sold by them to non-residents and sent beyond the State," leaves without limit or qualification the power to tax such portion of the capital so used at a rate *not* higher "than the *ad valorem* tax on property."

This view was taken by the court and was conceded by the counsel for the contestants in Friedman vs. Mathes, 8 Heiskell, 488, and its correctness is too plain for argument.

On this question the sylabus to the case is not correct. It states the court decided the Constitution exempts merchants from *any* tax on capital used in the purchase of goods sold to non-residents and sent beyond the State, whereas the decision was that such capital so used was exempt from any tax except at "a rate not higher than the *ad valorem* tax on property."

As already shown, the Supreme Court of Tennessee has decided the questions involved against the plaintiffs in error. And Judge Emmons reviewed Judge Brown's judgment of 2d March, 1876, and pronounced it correct.

See what he said in Brooks vs. City of Memphis, 3 Central Law Journal, p. 356, 358.

II

But it is said that Judge Brown had no authority or jurisdiction to pronounce the judgment of 2d of March, 1876.

1. This court said in Wayman vs. Southard, 10 Wheaton, 23, and repeated in Ex Parte Flippin, 94 U. S. (4 Otto), 350, that "the jurisdiction of a court is not exhausted by the rendition of

its judgment, but continues until the judgment is satisfied."

It has said further: "Process subsequent to judgment is as essential to jurisdiction as process anterior to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."

Riggs vs. Johnson County, 6 Wallace, 187.
Ex-parte Flippin, 94 U. S., (4 Otto), 350.

In Ex-parte Flippin, 94 U. S., (4 Otto), 350, this court also said, speaking of a writ of mandamus issued in this very suit:

"The writ of which the petitioners complained was one of execution to carry into effect the judgment in the original suit for the *mandamus.*"

And considering the suit of Brown against the city to recover the cost of laying down the Nicolson pavement in which the decree of 16th of March, 1875, was pronounced under the mandate of this court, as the principal suit, then it may be said with equal truth that the whole proceeding by *mandamus*, which culminated in the judgment of 30th March, 1875, commanding the levy of the taxes, including the writs issued thereunder, and the judgment of Judge Brown of 2d March, 1876, now in question, is but a final writ of execution and the proceedings thereunder, having for their object the enforcement of the decree of 16th, March, 1875.

Riggs vs. Johnson County, 6 Wallace, 166, 188–200.
United States vs. Council of Keokuk, 6 Wallace, 514, 518.
Mayor vs. Lord, 9 Wallace, 409, 414.
Ex Parte Holman, 28 Iowa. 97–99, 101, 104–107, 109–111, 111–112.

No principle of law is better understood, or is more necessary in the practical administration of the law than that a writ of final execution is completely within the control of the court from which it issues, and hence, that the court may recall or quash it, or stay its enforcement temporarily or absolutely, or direct the manner of its execution in any way *or to any extent* that may be necessary for the ends of substantial justice.

See in addition to cases cited above,
Freeman vs. Howe, 24 Howard, 450, 460–461.
Jones vs. Andrews, 10 Wallace, 327, 333.

And see what Judge Emmons said in Brooks vs. City of Memphis, 3 Central Law Journal, p. 356.

A court, and especially a court of equity (and the court will remember the decree being collected here is in equity, and the legal remedy for its enforcement is cumulative, having been adopted by a statute and rule of court), will go further and will actively aid a plaintiff in a judgment or decree rendered by it, or an officer proceeding to execute a writ issued to enforce such judgment or decree, and will instruct him what to proceed against and how to proceed, and also will protect him from any sort of extraneous interference tending to prevent or impede a proper discharge of his duties.
Terrell vs. Allison, 21 Wallace, 289, 291.
Board of Liquidation vs. McComb, 92 U. S. (2 Otto), 531, 541.
C. S. M. Co. vs. V. & G. H. W. Co., 1 Sawyer's C. C., 470, 482–483 and 685, 689–693.
Story's Eq. J., Secs. 891, 891a, 903.
Kerr on Injunctions, p. 144–145, 147.
Daniell's Ch., Pl. & Pr., p. 1270, 1837.
Fox vs. Hempfield, 2 Abbott, U. S. R., 151.

It follows necessarily as the cases all show, that having such powers, and so exercising them whenever occasions require one court will not permit another court, nor will such other court assume to examine into or decide the legality or regularity of its process, mesne or final, or control or direct the mode of executing the same.

In the course of this very litigation the precise question arose and the Circuit Court of Shelby County, and the Supreme Court of Tennessee, as well as Judge Emmons decided that the State courts of Tennessee had no authority to investigate or determine the legality of the taxes now in question, which had been levied under the *mandamus* from the Circuit Court of the United States, and that the authority to do so belonged exclusively to the Federal Courts.
See Brooks vs. City of Memphis, 3 Central Law Journal, 356.
Opinion of Supreme Court of Tennessee, MSS. Merchants of Memphis vs. City of Memphis and Schaper, Tax Collector, before referred to, and submitted herewith.

Under this state of the law, when Brown ascertained that the tax which the city had levied for the year 1875 to pay the one hundred and twenty-five thousand dollars required to be paid for that year on his decree, under the *mandamus* previously awarded by the Circuit Court of the United States, was not being collected on the taxable capital of merchants, I submit he had no possible remedy to compel its collection except by applying, as he did to the Circuit Court of the United States, for an additional writ of *mandamus*, and that the court had ample power and was obliged to do just what it did.

2. But it is said the merchants had no notice, and the city had none, except the service of the original alternative writ of *mandamus*.

The record shows the city appeared by its attorney on the motion before Judge Brown.

Record, p. 45.

That fact dispensed with the service of any process whatever.

Besides, having been formally brought into court by the alternative writ, the city remained in court for all the purposes of the suit, and no new process was required for anything it became necessary to do in order to enforce obedience to the principal judgment.

The law fixing the duty of the city, as well as the judgment of the Circuit Court of 30th of March, 1875, declaring it, were perfectly plain and direct and free from doubt, and there was no dispute about the facts, and hence the court very properly, and without unprofitably wasting time, made the judgment it pronounced on 2d of March, 1876, peremptory and final.

Commissioners of Knox Co. vs. Aspinwall, 24 Howard, 376.
Ex Parte Rogers, 7 Cowen, 526.
Ex Parte Goodell, 14 Johnson, 325.
People vs. Throop, 12 Wendell, 183.
People vs. Brennan, 39 Barbour, 522.
People vs. Assessors, 44 Barb., 148.
High on Extraordinary Legal Remedies, secs. 552, 553.

The merchants had no right to notice. The city represented them and the other taxpayers, and indeed was before the court as, and only because it was, their representative.

When it was urged before this court in State Railroad Tax Cases, 92 U.S.(2 Otto), 575, that the complaining taxpayers there had not been notified of the increase by the Board of Equalization of the estimates of value or assessments, and therefore that the whole assessment of the property and levy of the taxes was void, the court said:

"It is hard to believe that such a proposition can be seriously made." It then proceeded to show the impracticability of giving notice to the taxpayers, and decided none was necessary.

92 U. S. (2 Otto), 609–610.

In Supervisors vs. the United States, 4 Wallace, 435, 444, where it was sought to compel by *mandamus* the levy of a tax to pay a judgment, it was attempted to go behind the judgment against the town or city for the debt, and to show that the bonds on which it was based were invalid, and hence no tax ought to be levied for their payment. The court declined permitting the defense, and held that the judgment was conclusive on the application to compel the levy of the taxes of the lawfulness of the debt.

Mayor vs. Lord, 9 Wallace, 409, 413–414, is to the same effect.

And see High on Extraordinary Legal Remedies, sec. 380.

The same point that is now made here—namely, that the taxpayers were not parties to and were not concluded by Judge Brown's judgment of 2d of March, 1876, awarding a peremptory writ of *mandamus* to compel the levy of the tax—was made before the Supreme Court of Tennessee when the merchants from whom it is sought to collect the taxes involved here were trying to get relief from them in the State courts. The court said:

"The taxpayers are in one sense new parties, but the question they make is precisely the question which arose between Brown and the city, and which was decided. True, they were not parties, but it was the duty and interest of the city to make for them all the defenses that could be made as to want of power, and when the taxpayers presented themselves in the Federal Court as new parties, as it appears from a report of the proceedings they did, they presented themselves claiming in precisely the attitude of the city, not presenting a new right, but simply denying the correctness of the judgment awarding the peremptory *mandamus*. They might present new facts and considerations to the court, but the question was the same. The judgment they asked the court to render in their favor was to set aside, reverse or suspend the judgment rendered."

And elsewhere in the opinion the court said:

"The Federal Court in awarding the peremptory *mandamus* did not merely mean to say to the city, 'levy this tax provided you have under your charter the power to do so,' but it necessarily decided not only that the city had the power, but it was its plain duty to do so. Otherwise no *mandamus* could have been awarded. This decision certainly had the effect of a judgment and left the city no discretion. It was not necessary or proper that the taxpayers should have been parties. The act of adopting the ordinance levying the tax was not judicial but legislative in its character, and no notice to the taxpayers was necessary to give it validity as in judicial proceedings. It was a legislative act of taxation so far as notice is concerned."

See MSS opinion in Merchants of Memphis vs. City of Memphis and Schaper, Tax Collector, p. 15–23.

III

In the case of Flippin, *Ex Parte* 94 U. S. (4 Otto), 348, it was urged that the court had no power to divide or distribute the tax to be collected for the payment of the decree through three years, 1875, 1876 and 1877, but should have compelled the levy of the whole of it the first year. The court did not notice the point in that case, and it has not been assigned for error either in this case or in 941, and I suppose it is not to be relied on. Should it be I refer to what is said in my brief in Flippin Ex Parte, pages 10–12, and to the Code of Tennessee, sec. 2974, to show that the judgment is not only proper, but was shaped as it is for the interest of the city and the citizens, and not for the benefit of Brown

WM. M. RANDOLPH,
Of Counsel for T. E. Brown.

Affirmed

IN THE

Supreme Court of the United States.

The City of Memphis
AND OTHERS,
Appellants and Plaintiffs in Error.
vs.
T. E. Brown,
Defendant in Error,

No. 599.

BRIEF AND ARGUMENT OF WRIGHT & FOLKES.

Of Counsel for the City of Memphis and Merchants.

Tracy & Co., Printers, 295 Second St., Memphis

Also W. Y. C. Humes
of counsel with
Wright & Folkes

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We shall merely add to what Messrs. Humes & Poston have said in their brief and argument. Their positions seem to us conclusive.

1. In Tennessee, prior to the Constitution of 1834, the General Assembly of the State could alone levy a tax, or fix its amount. No county, city or town had any such power. Nor could the Legislature confer any such power upon a county, city or town. The power to tax was legislative, and could not be delegated. No authority but the peoples' representatives could be trusted in a matter so vital. Marr vs. Enloe, 1 Yer., 452. Kesee, et al, vs. The Civil District Board of Education, et al., 6 Cold., 127. Judge Catron, afterwards for years a member of the Supreme Court of the United States, decided Marr vs. Enloe, and with him on the bench at the time were Judges Robert Whyte and Nathan Green, all three lawyers of very great ability. In 1834, in Art. 2, Sec. 29 of the

Constitution, power was given to the General Assembly, so far as that body might deem it proper to do so, to authorize a county or an incorporated town to impose taxes for county and corporation purposes *in such manner as shall be prescribed by law.* This clause of the Constitution of 1834 is continued in that of 1870. And even with this clause in hand the Supreme Court of Tennessee, composed of Judges Green, Reese and Turley, lawyers remarkable for their ability, conservatism and foresight, as late as the year 1846, held that where the General Assembly had, *by express enactment, given the power to levy the tax sought*, the levy and collection could not be enforced by *mandamus* or other *judicial process against the will of the representatives of the people in the persons of the Justices of the County, who had to judge of the state of the debts of the County public, and into the means of the same public.* If the inhabitants were poor and embarrassed, and the pressure of the times great, the Justices, like the Legislature, stood as a wall between the people and the burthens of taxation.

Justices of Cannon County vs. Hoodenspile et al., 7 Hum., 145.

This case, whether wisely or not, has more recently been overruled. Newman vs. Scott County, 5 Sneed, 695. But we suppose that no Municipal Corporation can levy a tax, or fix the amount, unless expressly authorized by statute; and a *fortiori* not where the tax or the amount is prohibited by statute. Absence of power, and certainly its prohibition must be fatal to the tax. If a tax be fixed in amount, and a greater tax be forbidden, can the city go beyond it? If it can, it can levy a tax without a statute and against a statute, and without limit. *The particular tax—if not in express words and terms—must, by necessary implication, be authorized by the statute. No general words or terms will do. And if the mode in which the authority shall be exercised is prescribed, that mode must be pursued.* "*Where the mode of making improvements is prescribed by* "*statute, the mode in such cases constitutes the measure of power.*"

Field, Ch, J., in Zattman's case, 20 Cal., 102.

To the same effect is 2 Dillon on Municipal Corporations, sections 590–605, and Note; 606, and Note; 607, and Note; 609, 610 and 611, 4 Pet., 152. United States *ex. rel.* Learned vs. The Mayor and Council of the City of Burlington, 2 Am. Law Reg., (N. S.) 394.

A mandamus can compel the performance only of some act which the law authorizes. 18 Wallace, 71–83.

The power to create a liability does not, *per se*, imply or carry with it the power to levy and collect a tax to discharge such liabilities. United States vs. Mayor, etc. of Burlington, 2 Am. Law Reg., (N. S.) 394–400, and Note; especially as here, where the *tax is limited, and a greater tax interdicted, and where, also, the liability is to be discharged by a tax of particular persons and particular property, and not by taxation generally.* Loan Association vs. Topeka, 20 Wallace, 650.

Nor would a power to tax generally to pay a debt preclude the Legislature, by distinct or subsequent enactment, to so regulate the collection of the tax by installments at fixed rates as to secure the citizen and property owner against onerous and excessive taxation. United States vs. Mayor, etc. of Burlington, 2 Am. Law Reg., (N. S.) 394–399.

2. Keeping before us the above rules of law, what were the remedies secured to this contract when it was made? And have these remedies been impaired or lessened by after legislation? We concede to this contract all the remedies of taxation which existed at the time it was made, and that they cannot be withdrawn until the contract is satisfied. Von Hoffman vs. City of Quincy, 4 Wallace, 535. The limitations upon taxation contained in the various city charters of Memphis are stated in the brief of Messrs. Humes & Poston, coming down to the time of this contract, and it is demonstrated that since the contract the rate of taxation, instead of being abridged, has been extended. And if our view of the particular charter and law under which this contract was made, and to which it must be referred as stated hereafter, be not maintained, and *other* and *additional* statutes be relied on by this creditor as the source of his contract, then the various and uniform limitations upon the extent of the taxing power as shown in the brief of Messrs. Humes & Poston are conclusive in favor of our clients. We at once proceed to the particular charter, which we think controls the case. This contract was made under the Act of the 25th of November, 1866. Acts of 1866–1867, ch. 8, sec. 4, pp. 19–20. The Act was a new charter for the city, and repealed all others. This section of the charter authorized contracts to pave the streets, the

cost of the work to be borne by the owners of the adjoining property; and that a tax should be levied, assessed and collected from this abutting property to pay the debt. And it was under this section that this contract was made.

It seems to us a matter of grave doubt whether the City of Memphis could, under such a charter as this, guarantee the collection of this tax so as to bind the city. Hitchcock & Co. vs. The City of Galveston, 2 Woods' Rep., 272–287. But concede it could, it seems clear to us that taxation *generally upon the property or inhabitants of the city is, by the terms of the charter, excluded;* and that no other tax law beside this section of the charter could be claimed or enforced to pay the debt. The same section of the charter which confers upon the city the power to make these improvements, points out with minuteness and precision the manner in which the cost of their construction is to be defrayed. The property which is to pay, and the manner in which payment is to be enforced are designated. These provisions exclude any other method of payment. The case of the United States *ex. rel.* Ranger vs. The City of New Orleans, 2 Woods' Rep., 230–236, and Hitchcock & Co. vs. The City of Galveston, 2 Woods' Re p., 272–287, are conclusive and direct authorities to sustain this position. It is true that this section of the charter was declared unconstitutional and void, (Taylor, Mc-Bean & Co. vs. Chandler et al,, 9 Heiskell, 349), and the tax ceased to be of value. But this does not make the least difference, as the case of the United States *ex. rel.* Ranger vs. The City of New Orleans, 2 Woods' Rep., 230, shows. The only effect was to leave the contract without any tax law to pay it.

In March, 1873, the Legislature, by a general public law, gave all towns and cities power, in a case like this, to levy and collect a tax generally to pay the debt. But this act was repealed out and out, in the most explicit terms, without reservation, on the 20th of March, 1875. Could the Act of 1873 be repealed as to this debt? Clearly. It was no part of the contract. Citizens have no vested right in the existing general laws of the State which can preclude their amendment or repeal; and there is no implied promise on the part of the State to protect its citizens against incidental injury occasioned by changes of the law. And this is especially so as to the revenue laws of the State. The rate of taxation must ever vary with the exigencies of the State and its people. Cooley's Con.

Lim., pp. 125–126–127–283–284–285–290–292–362–363, and Note; 2 Black, 510. 1 Dillon on Municipal Corporations, Sections 35 and 36. 2 do., Sec. 608. Note to Article I, Sec. 20 of the Con. Tennessee—1 vol. of the Code, (Thompson & Steger's), pp. 79 to 82. Brandon vs. Green, 7 Hum., 130. 3 Head, 317. 9 Wallace, 567–575.

In Cooley on Taxation, it is said: "The repeal of a tax law "before the tax is collected puts an end to the tax itself, where no "rights are reserved in the repealing act, and nothing in the act indicates a contrary intent." Cooley on Taxation, p. 14. And in Note 1 to Cooley on Taxation, p. 253. citing Augusta vs. North, 57 Me., 392, is is said: "The right to tax may be taken away by "the Legislature even after the tax had been levied." And that the Legislature here had complete power over the Act of 1873. See Cooley on Taxation, pp. 52, 53 and 252–253.

Does Sec. 49 of the Code retain the Act of 1873 as to this contract, notwithstanding the repeal? We think clearly not. The words "right which accrued," means a vested, irrepealable right. But the Act of 1873 only gave a *remedy where none existed before—not a right.* 4 Hum., 13. 7 do., 130. It surely does not mean what may be called the right of every citizen in every public law. And as to "duty imposed," it surely cannot mean the duty which every citizen, or class of citizens, is under to obey the law. If that were so, how could any law be repealed, unless the Sec. 49 of the Code were also, in every case, from time to time repealed? The intention to repeal the Act of 1873 is clear and conclusive. And that it is repealed, admits of no debate, unless Sec. 49 of the Code retains it. 9 Wallace, 567.

The words "proceeding commenced," if it includes a Federal suit at all, (24 Howard's Rep., 159), simply means to prevent the suit or proceeding from falling, as was the common law rule, (9 Wallace, 567); and the new, or repealing law, takes up and adopts the suit or proceeding where the old law left it, and from thence it proceeds under the new law. This is clear. 6 Wend., 527. But if we concede that the Act of 1873 imposed a duty on the City of Memphis to levy a tax to pay this debt, that did not prevent the repeal of the act, and it was repealed effectually. This is clear. 6 Wend., 527. And the Code, Sec. 49, only preserved certain things that by common law fell by the repeal. But these things could only be available under the new law—the Act of 1875—and in accordance with that act. The Act of 1873 did not fix the rate of taxation. And if it did, it could be changed. And if the duty to levy the tax in the old law was carried along, by force of Sec. 49 of the Code to the new law, it must be executed under and in accordance with the new law; otherwise it could not be executed at all, the old law being repealed. The rate of taxation was entirely with the Legislature. This is clear. United States vs. Mayor etc. of Burlington, 2 Am. Law Reg., (N. S.), 394–398, and Note. 6 Wend., 527.

3. That the Act of 1875, Sections 63 and 64, effectually limits the taxes in the City of Memphis, *for any and all purposes*, to $1.60 on the $100.00, is clear. And certainly, as to this contract, no rule forbid it. And the mandamus can force no higher or greater tax. United States vs. Mayor etc. of Burlington, 2 Am. Law Reg., (N. S.) 394, and Note. 18 Wallace, 71.

4. The fact that Brown's suit happens to be in the Federal Court puts him on no higher or better ground than if in the State Court. He is there because he is a citizen of another State, but his rights and remedies are the same as if in the State Court. 21 Wallace, 130. do. 276.

5. The Code of Tennessee has no application to this case. Sections 1349 to 1399 contain all that is in the Code as to Municipal Corporations.

It is obvious that they apply to certain corporations created by elections through the votes of the people who may desire incorporation, and have no application to charters, like that of Memphis, granted direct, and at once by the Legislature, with complete powers in the charter. But if the Code could apply, there is nothing in its provisions that authorizes a tax to pay this debt, not only because the terms are not specific, but also because the act of the 24th of November, 1866, under which this contract was made, and other *particular legislation* existing at the time, override *the general provisions* of the Code. And of course, the act of 1875 supersedes every law or statute which is in conflict with it, uuless secured against repeal or change, because a part of this contract. 1 Dillon on Municipal Corporations, Sec. 54, and Note 1. 18 Wallace, 71, 2 Am. Law Reg., (N. S.) 394, and Note.

6. It will be noted that the Act of 1875 does provide a remedy for this very debt, and that further and larger legislation can be had as the General Assembly may deem safe and wise, and as the exigencies of the inhabitants of the city may allow.

7. The court will go behind the judgment to get the time when the contract was made, in order to see what remedies were secured by taxation to the contract. 18 Wallace, 71. The true time is the contract, and not the judgment. A judgment is not secured by the Constitution of the United States like a contract. Colder and wife vs. Ball and wife, 3 Dallas' Rep., 386. Brandon vs. Green, 7 Hum., 130.

8. The merchants were not bound by the orders and decrees got by Brown against the City of Memphis until they came in and become parties. 19 Wallace, 107–122. 4 Otto, 715–718.

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For the City of Memphis and Merchants.